

# Owner and Promoter Liability in “Club Drug” Initiatives

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*Drug abuse is perhaps one of the most pervasive social issues across the globe and throughout history. From alcoholism to opium dens, and from marijuana to ecstasy, every nation has had to address some form of drug abuse at one time or another. Some have taken a relatively relaxed approach, while others have embarked on a widespread campaign to eliminate drug abuse completely. Which of these approaches is more effective or desirable is not at issue in this Note.*

*What is at issue in this Note is the fact that—regardless of how relaxed or strict a nation’s drug policy may be—every nation faces the same fundamental issue: to what lengths are we willing to go in order to bring drug abuse to the desired level? What freedoms may be sacrificed in the name of fighting drug abuse, and by how much may they be sacrificed?*

*The specific freedom at issue in this Note is the freedom of musical expression, and the specific drug control policies at issue are a group of proposed or enacted laws that to some degree hold owners and promoters of music events liable for drug abuse that occurs during their events. More specifically, these laws address the abuse of “club drugs,” and include the Illicit Drug Anti-Proliferation Act (or the RAVE Act), the Ecstasy Awareness Act, the CLEAN-UP of Methamphetamines Act, and the Ecstasy Prevention Act.*

*This Note lays out a framework of arguments for and against these laws, in an attempt to illuminate the discussion of two underlying issues. First, is the potential loss of artistic expression and speech caused by these laws justified by the nature of the club drug problem? Second, are those laws the best means to achieve the desired level of control over club drugs?*

## I. INTRODUCTION

Toronto. August 1, 2000. As the evening hours approach, people begin to gather downtown in Nathan Philips Square—first by the hundreds, then by the thousands—ultimately swelling to a crowd of twenty thousand.<sup>1</sup> For months, Toronto has banned raves from city property, and on the eve of the city council’s vote to possibly end this ban, concerned citizens and music enthusiasts have come

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\* J.D., The Ohio State University Moritz College of Law, expected 2005. Special thanks to my family and to Julia for their constant love and encouragement, and to Mike Zucosky and Michael Marotta—great friends and bandmates who helped give me the idea for this Note. Thanks also to Professor Edward Foley for direction in the free speech analysis.

<sup>1</sup> See Ben Rayner, *Time to Embrace Techno-Music Tourism*, TORONTO STAR, June 1, 2003, at D2, LEXIS, News & Business, Toronto Star File.

out en masse for the iDance rally, to make their voices heard.<sup>2</sup> The city has labeled raves a dangerous breeding ground for drugs, guns, and violence,<sup>3</sup> but the DJs and speakers at the rally are trying to portray a different picture, and showcase the positive and unique values that raves represent—both in art and community.<sup>4</sup> The outcome? The city council got the message, and voted fifty to four to lift the ban.<sup>5</sup>

Two hundred forty miles away, just across the quiet waters of the Detroit River, lies the birthplace of techno music,<sup>6</sup> in a country that was only just beginning to respond to its own problem of drug use at raves. In this year, the Ecstasy Anti-Proliferation Act of 2000<sup>7</sup> was passed with little attention,<sup>8</sup> almost offhandedly mentioning “raves” as a synonym for locations of ecstasy use.<sup>9</sup> Over the next three years, four more acts<sup>10</sup> would be introduced in Congress that would tighten the legislative link between raves and drugs, and a number of cities would begin to take their own anti-drug measures aimed at raves.<sup>11</sup>

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<sup>2</sup> See Ben Rayner, *Rallying For The Right to a Ravin' Good Time*, TORONTO STAR, Aug. 2, 2000, at D5, LEXIS, News & Business, Toronto Star File.

<sup>3</sup> Rayner, *supra* note 1 (noting that the city's ban was prompted by “months of inflated anti-drug hysteria and unfounded police claims of violence and guns at dance events”).

<sup>4</sup> Sean Stanleigh, *Analysis: Peaceful Rave Rally Was a Seminal Event*, TORONTO STAR, Aug. 4, 2000, at B4, LEXIS, News & Business, Toronto Star File.

<sup>5</sup> *Id.* The promoters of the iDance rally also stressed that the rally was important for “opening a dialogue between promoters and the police and ‘giving the electronic-party industry some cultural legitimacy in the eyes of the media.’” Ben Rayner, *Rave Culture Celebration Cancelled*, TORONTO STAR, July 17, 2002, at D1, LEXIS, News & Business, Toronto Star File.

<sup>6</sup> Rayner, *supra* note 1.

<sup>7</sup> Ecstasy Anti-Proliferation Act of 2000, S. 2612, 106th Cong. (2000). This Act mainly authorizes funds to educate the public about ecstasy use, and to study the health effects of ecstasy use. *Id.*

<sup>8</sup> Children's Health Act of 2000, Pub. L. No. 106-310, §§ 3661–73, 114 Stat. 1101, 1241–46 (2000).

<sup>9</sup> *Id.* § 3662(3).

<sup>10</sup> Ecstasy Prevention Act of 2001, H.R. 2582, 107th Cong. (2001); Reducing Americans' Vulnerability to Ecstasy Act [RAVE Act], S. 2633, 107th Cong. (2002); Clean, Learn, Educate, Abolish, Neutralize, and Undermine Production of Methamphetamines Act of 2002 [CLEAN-UP of Methamphetamines Act], S. 2763, 107th Cong. (2002); Ecstasy Awareness Act of 2003, H.R. 2962, 108th Cong. (2003).

<sup>11</sup> See, e.g., *Looking the Other Way: Rave Promoters and Club Drugs: Hearing Before the Senate Judiciary Caucus on Int'l Narcotics Control*, 107th Cong. (2001) [hereinafter *Hearings: Looking the Other Way*] (statement of Asa Hutchinson, Adm'r, Drug Enforcement Admin.) (noting use of nuisance ordinances and health codes to shut down raves in Hartford and South Carolina cities), available at <http://www.usdoj.gov/dea/pubs/cngrtest/ct120401.html> (last visited Feb. 25, 2005).

It was enough to incite iDance's American counterparts to now make *their* collective voice heard. On September 6, 2002, thousands of people gathered at coordinated rallies in New York, Los Angeles, Washington, D.C., San Francisco, Albuquerque, and other cities, to protest the RAVE Act as it sat in Congress.<sup>12</sup> As in Toronto, these rallies appeared to be successful: over fifty thousand people faxed protests to Washington, two senators withdrew their sponsorship of the bill, and the Act was eventually tabled.<sup>13</sup> But even before there was a chance to regroup, the RAVE Act was effectively resurrected and passed the following year.<sup>14</sup> Another nationwide, multi-city rally was organized to protest the bill again—even if it was too late to prevent its passage.<sup>15</sup> Were these protests a failure? Futile?

Besides their individual importance—with regard to a specific issue or law—these protests are important as collectively serving a broader purpose. Together, they constitute exchanges in an ongoing public debate about drug policy. And whether the specific issue under debate is rave bans in Toronto, the RAVE Act in our own federal government, or state and local laws restricting raves, there is an underlying issue uniting them all. That issue is the degree to which drug enforcement policy should expand from liability for a person's *direct* manufacture, sale, or use of drugs, to liability for those *not* directly involved. This Note focuses on one specific aspect of this expansion of liability: the move from liability for direct involvement in the sale or use of drugs to liability for owners and promoters of events at which drug activity occurs.

Existing drug laws are generally premised on the idea that a person must have actually participated in the use or sale of controlled substances.<sup>16</sup> The one possible exception to this general rule is the so-called "crack house law," which creates liability for maintaining drug-involved premises.<sup>17</sup> As interpreted by the courts, this law can be applied when landowners know of drug activity on their

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<sup>12</sup> See Margarita Ortega y Gomez, *Right to Dance is Not a Crime*, UNIVERSITY WIRE, March 13, 2003; Christine Pelisek, *The Crack-House Rave*, L.A. WEEKLY, Sept. 13, 2002, at 17. This rally was collectively called "Freedom to Dance." *Id.*

<sup>13</sup> See Jason Bracelin, *The Law Won*, CLEVELAND SCENE, April 23, 2003, at 51.

<sup>14</sup> See *id.* The RAVE Act expands 21 U.S.C. § 856 in ways intended to make it more applicable to rave promoters and owners. See *infra* Part IV.B.

<sup>15</sup> See Steve Baltin, *A Day to Shake Your Body Politic*, L.A. TIMES, May 29, 2003, at E18. This rally was titled "Freedom to Dance 2: Show Our Strength," and occurred simultaneously in Los Angeles, Seattle, New York, and Washington, D.C. on May 31, 2003. *Id.*

<sup>16</sup> See, e.g., 21 U.S.C. §§ 841–64 (2000).

<sup>17</sup> 21 U.S.C. § 856 (2000). In general, this law imposes liability on landowners who do not physically partake in the manufacture, sale, or use of drugs, but intentionally allow their property to be used by others for those purposes. See *id.*; see also *infra* Part IV.B.

property, but do not intend to participate in that activity.<sup>18</sup> But due to careful charging and prosecution, persons have only been convicted of this law when they have directly participated in drug activity.<sup>19</sup>

Recently, this pattern of prosecutions has changed in response to a newly perceived form of drug abuse: the phenomenon of "club drugs."<sup>20</sup> The rapid rise in the abuse of these drugs<sup>21</sup> and their resistance to traditional enforcement measures<sup>22</sup> have finally prompted prosecutors to take advantage of the judicial expansion of the crack house law. After long and costly investigations of several music entertainment venues,<sup>23</sup> prosecutors have forgone charges against drug dealers and instead arrested the owners and promoters of the venues.<sup>24</sup> These persons were charged under the crack house law even though there were no allegations or evidence that they were actually involved in, or intended to be involved in, drug trafficking.<sup>25</sup> Each of these charges failed to result in a conviction,<sup>26</sup> but prosecutors made it clear that they felt the responsibility for the

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<sup>18</sup> See *United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990); *United States v. Tamez*, 941 F.2d 770, 774 (9th Cir. 1991); *United States v. Banks*, 987 F.2d 463, 466 (7th Cir. 1993). Although subsection (a)(2) of this law requires a person to have both knowledge of drug activity and a purpose to engage in that activity, the courts have held that requiring the *accused* to have the purpose would make subsection (a)(2) duplicative of (a)(1). Therefore, the courts have ruled that it is the person being allowed to use the accused's property that must have the purpose of engaging in drug activity. See *Chen*, 913 F.2d at 188-92.

<sup>19</sup> See *Reducing Americans' Vulnerability to Ecstasy Act of 2002: Hearing on H.R. 5519 Before the House Subcomm. on Crime, Terrorism, and Homeland Sec. of the House Comm. on the Judiciary*, 107th Cong. 21 & n.1 (2002) [hereinafter *Hearings: RAVE Act*] (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU), available at <http://www.house.gov/judiciary/82263.pdf> (last visited Feb. 25, 2005).

<sup>20</sup> Essentially, club drugs are any drugs commonly used at nightclubs and raves. See *infra* Part II.A.

<sup>21</sup> See *infra* Part V.A.1.

<sup>22</sup> See *infra* Part V.A.2.

<sup>23</sup> Police raided Club La Vela, home to MTV's Spring Break in Panama City Beach, Florida, in April 2000. See Mike Clements, *Police Shut Down Party of Thousands*, NEWS HERALD (Panama City Beach, Fla.), April 29, 2000, <http://www.newsherald.com> (last visited Feb. 25, 2005). In August, 2000, the DEA raided the State Palace Theater in New Orleans. See *McClure v. Ashcroft*, 335 F.3d 404, 406 (5th Cir. 2003).

<sup>24</sup> Many of these drug dealers received immunity for their crimes in exchange for their testimony against the owners and promoters. See David Angier, *La Vela Jurors Cite Lack of "Hard Evidence"*, NEWS HERALD (Panama City Beach, Fla.), Dec. 5, 2001, <http://www.newsherald.com> (last visited Feb. 25, 2005).

<sup>25</sup> See *United States v. Brunet*, No. 01-CR-10 (E.D. La. Jan. 12, 2001); *United States v. Pfeiffer*, No. 5-01-CR-07-RH (N.D. Fla. 2001).

<sup>26</sup> The charges against the owner and promoter of the State Palace Theater were dropped, and the managing company of the theater entered into a plea agreement. *McClure*, 335 F.3d at

drug activity at these events did not fall on individual dealers or users, but on the owners and promoters of the events.<sup>27</sup>

In response to these acquittals, members of Congress felt that new tools were needed to respond to the problem of club drugs. The crack house law was amended to make it more applicable to rave owners and promoters,<sup>28</sup> and two new bills were introduced that would greatly expand this form of indirect liability.<sup>29</sup> These latter Acts would impose liability on any owners or promoters who simply had knowledge—or even *reason to know*—that drug use was occurring during their events.<sup>30</sup> To that extent, they represent a clear departure from existing drug laws.

While there may be specific aspects of the club drug phenomenon that justify taking *some* kind of new enforcement measures, there are also legitimate concerns about pursuing expanded liability for owners and promoters of entertainment events as a solution. In particular, such laws, either as written or as applied by law enforcement, may discriminate against certain forms of music or speech.<sup>31</sup> Also, business owners allege that such laws are inherently vague, and offer them no guidance or protection for running a legitimate event where drug activity occurs despite any measures taken to prevent it.<sup>32</sup> And still other critics claim that regardless of these problems, such laws will ultimately be ineffective at solving the problems associated with club drugs.<sup>33</sup> However, since the idea of holding a landowner liable for wrongful acts committed on their property by another person is not without precedent,<sup>34</sup> there is no reason to presume that it is

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406–07. The owners of Club La Vela were acquitted after seventy-five minutes of deliberation. See, e.g., David Angier, *La Vela Officials Acquitted*, NEWS HERALD (Panama City Beach, Fla.), Nov. 28, 2001, <http://www.newsherald.com> (last visited Feb. 25, 2005).

<sup>27</sup> The prosecutor in the State Palace Theater case acknowledged that filing charges under the crack house law was a "reach." Apparently, the authorities felt the promoters and owners were guilty of *something*, and the crack house law was "the only statute that seemed to fit." Donna Leinwand, *Cities Crack Down on Raves*, USA TODAY, Nov. 13, 2003, at A1 (quoting prosecuting attorney Al Winters).

<sup>28</sup> See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 [PROTECT Act], Pub. L. No. 108-21, § 608, 117 Stat. 650, 691–92 (2003); see also 149 CONG. REC. S1678 (daily ed. Jan. 28, 2003) (statement of Sen. Biden) (noting that the results from these two cases showed the crack house law needed to be amended to adapt to the rave environment).

<sup>29</sup> CLEAN-UP of Methamphetamines Act, S. 2763, 107th Cong. (2002); Ecstasy Awareness Act of 2003, H.R. 2962, 108th Cong. (2003).

<sup>30</sup> S. 2763 § 305; H.R. 2962 § 2.

<sup>31</sup> See *infra* Part V.B.3.

<sup>32</sup> See *infra* Part V.B.2.

<sup>33</sup> See *infra* Part V.B.1.

<sup>34</sup> For example, some states hold individuals liable if they knowingly allow someone to commit acts of prostitution on their property and fail to abate that use. See, e.g., CONN. GEN.

inherently without merit. Rather, other examples of “permissive” liability may serve as a source of comparison and offer solutions to make an expansion of liability with respect to drug activity more acceptable, such as including a safe harbor provision for legitimate business practices.

These concerns have certainly not gone unnoticed, but the public discussion and debate over the merits of this expansion in liability have not always been particularly fruitful or constructive. Opponents of this expansion have sometimes confused the various laws at issue<sup>35</sup> and attacked the motives of the proponents of expanded liability.<sup>36</sup> For their part, proponents of this expansion have often failed to acknowledge the positive aspects of the art and community that are likely to be affected by their laws<sup>37</sup> or to respond to the legitimate concerns raised by their critics.<sup>38</sup>

Therefore, the primary goal of this Note is to lay out a framework of the legal and public policy issues at the center of the debate on expanding liability to owners and promoters of entertainment events as a measure to address the abuse of club drugs. As such, Part II discusses the nature of the club drug phenomenon, by outlining the rave subculture often associated with these drugs, and providing a background on the specific substances commonly designated as club drugs. Part III then details some of the enforcement policies that have been taken at the city, state, and federal levels which show that responsibility for the club drug phenomenon is no longer being placed only on those directly involved in drug activity. Following this, Part IV introduces specific legislation at the federal level that has sought to expand liability for drug activity to the owners and promoters of the raves and entertainment events at which it occurs. Part V then introduces a framework for considering the merits of this expansion in liability. It first explains why such a framework is needed, and then outlines the positions on either side of the expansion. Part VI then seeks to *advance* this discussion by offering two suggestions that do much to relieve concerns on both sides: a safe harbor provision and content-neutral drafting.

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STAT. § 53a-89 (2002); DEL. CODE ANN. tit. 11, § 1355 (1989); KY. REV. STAT. ANN. § 529.070 (Michie 1999); N.Y. PENAL LAW § 230.40 (McKinney 2000); WASH. REV. CODE ANN. § 9A.88.090 (West 2000); 9 GUAM CODE ANN. § 28.25(4) (2003).

<sup>35</sup> See, e.g., 149 CONG. REC. S10,607 (daily ed. July 31, 2003) (statement of Sen. Biden); 149 CONG. REC. S5153 (daily ed. Apr. 10, 2003) (statement of Sen. Biden).

<sup>36</sup> See, e.g., 149 CONG. REC. S1678 (daily ed. Jan. 28, 2003) (statement of Sen. Biden) (noting opponents have accused him of merely wanting to “ban dancing, kill the ‘rave scene’ or silence electronic music”); see also *infra* notes 207–09 and accompanying text.

<sup>37</sup> See *infra* notes 210–14 and accompanying text.

<sup>38</sup> See *infra* notes 215–23 and accompanying text.

## II. THE RELATIONSHIP BETWEEN RAVES AND CLUB DRUGS

The issue of club drugs has been called "one of the most startling law enforcement and social issues facing the United States in the early part of the twenty-first century."<sup>39</sup> It has been the subject of a multi-million dollar educational campaign,<sup>40</sup> the target of legislation<sup>41</sup> and enforcement programs,<sup>42</sup> and the topic of a continuous and heated public debate.<sup>43</sup> But what exactly are "club drugs," and what is it about them that has raised such pointed concerns? More importantly, what is it about club drugs that makes it more or less desirable or effective to treat them as a group—whether it be for purposes of education, legislation, or enforcement?

### A. *The Rise of Raves and Club Drugs*

As their collective label implies, club drugs are a particular group of illegal substances commonly encountered at and associated with nightclubs and raves.<sup>44</sup> Although this term is often used in a rather vague and inexact manner, the list of club drugs is generally composed of MDMA (Ecstasy), Methamphetamine, Flunitrazepam (Rohypnol), Gamma Hydroxybutyric Acid (GHB), Ketamine (Special K), and LSD.<sup>45</sup> Most of these drugs have been in existence for several decades, but it is only since the late 1980s that their collective abuse began to attract the attention of our government and media.<sup>46</sup> It was around this time that

<sup>39</sup> Videotape: Ecstasy & Other Club Drugs: Dancing with Darkness (Drug Enforcement Admin.) [hereinafter DEA Video], available at [http://www.phatnetwork.net/emdef/the\\_video.mov](http://www.phatnetwork.net/emdef/the_video.mov) (last visited Feb. 25, 2005) (statement of Donnie Marshall, Adm'r, Drug Enforcement Admin.).

<sup>40</sup> See Larry Smith, *E-fer Madness*, Sept. 16, 2003, at [http://www.salon.com/mwt/feature/2003/09/16/ecstasy\\_retraction/index\\_np.html](http://www.salon.com/mwt/feature/2003/09/16/ecstasy_retraction/index_np.html) (last visited Feb. 25, 2005) (noting the government's \$54 million educational campaign on club drugs in 1999).

<sup>41</sup> See *infra* Part IV.

<sup>42</sup> See *infra* Part III.

<sup>43</sup> See, e.g., David Montgomery, *Ravers Against the Machine: Partiers and ACLU Take on 'Ecstasy' Legislation*, WASH. POST, July 18, 2002, at A1.

<sup>44</sup> Hearings: *Looking the Other Way*, *supra* note 11 (statement of Asa Hutchinson, Adm'r, Drug Enforcement Admin.).

<sup>45</sup> *Id.*

<sup>46</sup> See *Ecstasy: Underestimating the Threat: Hearing Before the Senate Judiciary Caucus on Int'l Narcotic Control*, 106th Cong. (2000) [hereinafter *Hearings: Underestimating the Threat*] (statement of Steven S. Martin, Scientist, Ctr. for Drug and Alcohol Studies, Univ. of Del.), available at <http://www.drugcaucus.senate.gov/ecstasy00index.html> (last visited Feb. 25, 2005); *Hearings: RAVE Act*, *supra* note 19, at 8.

the European “rave” scene—events generally characterized by electronic music and elaborate light and visual productions, often lasting from late at night into the early morning hours—began to appear in the United States.<sup>47</sup>

As with its European counterpart, the American rave scene grew quickly while remaining a relatively “underground” movement of youth subculture.<sup>48</sup> This movement was morally united by a value system known as “PLUR” (Peace, Love, Unity, and Respect), which overtly rejected the materialism of the “me” generation.<sup>49</sup> In addition to this, the rave subculture rapidly generated a particular visual and musical aesthetic which was both distinctive and unusual. Some of the more recognizable stereotypes of the rave subculture’s visual aesthetic include baggy, lightweight clothing, and accessories such as pacifiers, candy necklaces, glitter body paint, and glow-sticks.<sup>50</sup> Musically, raves are associated with a form of electronic music called “techno,” described as “dance music with a fast,

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<sup>47</sup> *Hearings: Looking the Other Way*, *supra* note 11 (statement of Asa Hutchinson, Adm’r, Drug Enforcement Admin.). In many cases, raves are scheduled from night until morning in order to avoid local curfew restrictions. *Id.*

<sup>48</sup> DRUG ENFORCEMENT ADMIN., RAVES, at <http://www.dea.gov/ongoing/raves.html> (last visited Feb. 25, 2005) [hereinafter DEA: RAVES]. The growth of raves in the United States was both accompanied and facilitated by the growth of the internet. Since information about raves was often communicated through word-of-mouth, internet chat rooms were an effective medium for quickly spreading information about the location and other details of upcoming raves. *See id.*; *Hearings: Looking the Other Way*, *supra* note 11 (statement of Asa Hutchinson, Adm’r, Drug Enforcement Admin.).

<sup>49</sup> Erica Weir, *Raves: A Review of the Culture, the Drugs and the Prevention of Harm*, 162 CAN. MED. ASS’N J. 1843, 1843 (2000), available at <http://www.cmaj.ca/cgi/content/full/162/13/1843> (last visited Feb. 25, 2005).

<sup>50</sup> *See* NAT’L DRUG INTELLIGENCE CTR., U.S. DEP’T OF JUSTICE, PROD. NO. 2001-L0424-004, INFORMATION BULLETIN: RAVES 2 (2001) [hereinafter INFORMATION BULLETIN: RAVES], available at <http://www.usdoj.gov/ndic/pubs/656/656p.pdf> (last visited Feb. 25, 2005). Although most of this style has been explained in terms of its functional value, it seems likely that by this point in time, dressing in this manner is as much functional as it is a means of identifying oneself with a particular sub-culture. For example, baggy, lightweight clothing helps keep ravers cool and unrestrained in movement as they literally dance all night long, and some people wear pacifiers to alleviate the urge to grind their teeth caused by ecstasy. But because of the large part that clothing plays in self-identification, this functional value (whether in relation to dancing or drug use) is likely overshadowed by the desire to identify with other ravers. Furthermore, the choice of baggy, androgynous clothing diminishes the focus on physical attractiveness—reinforcing the acceptance that underlies the rave culture’s value system and the rejection of the superficiality of “mainstream” culture. *See* Weir, *supra* note 49, at 1843–44; *see generally* Chrys Kahn-Egan, *Degeneration X: The Artifacts and Lexicon of the Rave Subculture*, 20.3 STUDIES IN POPULAR CULTURE (1998) (discussing the various elements of the rave aesthetic), available at <http://www.pcasacas.org/SPC/spcissues/20.3/kahn-egan.htm> (last visited Feb. 25, 2005).



pounding beat.”<sup>51</sup> But within this rather generic and overinclusive genre, the rave subculture has spawned a vast array of musical sub-genres, including ambient, trance, house, jungle, drum ‘n’ bass, techstep, garage, and big beat.<sup>52</sup>

As with any subculture, looking or sounding different is likely to raise eyebrows. But what was most troubling to politicians, parents, and media was the growing awareness of drug use at raves, in conjunction with the markedly young age of many rave attendees—most of whom fell between the ages of twelve and twenty-five.<sup>53</sup> When the rave scene first began to spread to the United States, many parents believed that raves created a relatively safe environment for their children, in part because raves are often advertised as “alcohol-free.”<sup>54</sup> But what some of these parents did not realize was that the surreal world of light and sound that their children would experience during the rave would often also include exposure to the “flagrant and open drug use” by some attendees.<sup>55</sup> As word and concern spread over the drug abuse present at raves and nightclubs, the issue came to be christened as the problem of “club drugs.”

### B. *The True Nature of Club Drugs*

Apart from where these drugs are used, they share little in common—and even this association is dissipating as their use disperses throughout the general population.<sup>56</sup> An overview of some of the common club drugs discloses that they vary widely in terms of their effects, their sources of production, and their methods of importation. Such variety is important to keep in mind when considering the efficacy of education, harm-prevention, or enforcement programs that treat club drugs as a homogenous group.

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<sup>51</sup> See INFORMATION BULLETIN: RAVES, *supra* note 50, at 1.

<sup>52</sup> *Id.* at 2.

<sup>53</sup> See *Hearings: Looking the Other Way*, *supra* note 11 (statement of Asa Hutchinson, Adm’r, Drug Enforcement Admin.).

<sup>54</sup> *Id.* Promoters often include this in advertisements both because alcohol is not popular with many rave attendees and because raves are often held in open fields or large, warehouse-type facilities that do not have liquor licenses. DEA: RAVES, *supra* note 48.

<sup>55</sup> DEA: RAVES, *supra* note 48.

<sup>56</sup> *Research on MDMA: Testimony Before the Subcomm. on Criminal Justice, Drug Policy and Human Res.*, 107th Cong. (2002) (statement of Glen R. Hanson, Acting Dir., Nat’l Inst. on Drug Abuse, Nat’l Inst. of Health, Dep’t of Health and Human Servs.), available at <http://www.drugabuse.gov/Testimony/9-19-02Testimony.html> (last visited Feb. 25, 2005).

### 1. Ecstasy

The technical name for ecstasy is MDMA (3, 4-methylenedioxymethamphetamine).<sup>57</sup> In its chemical structure, ecstasy is similar to methamphetamine and mescaline, giving it both stimulant and hallucinogenic properties.<sup>58</sup> Use of ecstasy generally creates feelings of empathy, euphoria, peace, heightened sensory perception, as well as restlessness, bruxism (involuntary grinding of teeth), and hyperthermia.<sup>59</sup> Because of the feelings of empathy brought on by ecstasy use, some therapists have used ecstasy to treat patients and couples to help overcome their inhibitions.<sup>60</sup> However, as a result of studies showing a “significant potential for neurotoxicity in lab animals,”<sup>61</sup> ecstasy was placed on Schedule I status in 1986.<sup>62</sup>

Because ecstasy and its precursor chemicals have no recognized medical uses in the United States, they are not commercially manufactured within this country.<sup>63</sup> And because of the abundant supply of imported ecstasy, there has

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *America at Risk: The Ecstasy Threat: Hearing Before the Senate Judiciary Caucus on Int'l Narcotics Control*, 107th Cong. (2001) [hereinafter *Hearings: America at Risk*] (statement of Dr. Bill Jacobs, Medical Dir., Gateway Cmty. Servs.), available at <http://www.drugcaucus.senate.gov/ecstasyindex.html> (last visited Feb. 25, 2005).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* Studies on the long-term health effects of ecstasy are currently under debate. The formerly leading study showing that typical ecstasy use can cause death or damage to serotonin pathways in the brain was officially retracted by the magazine *Science*, after it was discovered that a chemical used in the study was mislabeled, and was actually methamphetamine rather than ecstasy. Donald G. McNeil, Jr., *Research on Ecstasy is Clouded by Errors*, N.Y. TIMES, Dec. 2, 2003, at F1. The results of this study have not been replicated, and a German study has shown that serotonin levels in average ecstasy users return to normal within six weeks. *Id.* However, the dangers of hyperthermia associated with ecstasy are well documented, and there is evidence that ecstasy use may cause liver damage. See *Hearings: America at Risk*, *supra* note 59 (statement of Dr. Bill Jacobs, Medical Dir., Gateway Cmty. Servs.).

<sup>62</sup> 21 C.F.R. § 1308.11 (2003); see 51 Fed. Reg. 36,552 (Oct. 14, 1986). The DEA initially tried to place ecstasy on Schedule I status under the emergency scheduling provisions of the Controlled Substances Act that allow the Attorney General to temporarily schedule a substance if it is “necessary to avoid an imminent hazard to public safety.” 21 U.S.C. § 811(h) (2000); see also 50 Fed. Reg. 23,118 (May 31, 1985) (to be codified at 21 C.F.R. pt. 1308). However, this authority is vested in the Attorney General, who had not subdelegated this power or otherwise authorized the DEA to make these emergency schedulings. Consequently, this scheduling was ruled ineffective. *United States v. Pees*, 645 F. Supp. 697, 704 (D. Colo. 1986). But the DEA quickly corrected this error by placing ecstasy on permanent Schedule I status through the standard notice and comment procedure. See 51 Fed. Reg. 36,552.

<sup>63</sup> *Hearings: America at Risk*, *supra* note 59 (statement of Dr. Bill Jacobs, Medical Dir., Gateway Cmty. Servs.). Ironically, the consequence of this fact is negative in some respects.

been little need for drug organizations within the United States to manufacture ecstasy themselves.<sup>64</sup> Furthermore, because ecstasy is a synthetic drug, it does not need particular geological or climatic conditions for its production.<sup>65</sup> As a result, most production takes place in small laboratories in Europe, and the ecstasy is then smuggled into the United States and other countries.<sup>66</sup> Because this production has been mostly confined to Europe,<sup>67</sup> the trafficking of ecstasy into the United States has been dominated by Israeli and Russian organized crime; only recently have Colombian and Mexican drug organizations become involved.<sup>68</sup> At the street level, ecstasy dealers tend to differ from other drug dealers in background and appearance in that they often "look like any middle class, clean cut, young adult."<sup>69</sup> Of course, as with all drugs, production and

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Where drugs are manufactured commercially, their production must meet certain safety and quality regulations. Thus, when the drug is diverted from legitimate use, its contents are certain. But when drugs are manufactured illegally, their makeup and quality is often unknown, or at least unpredictable, and they may be even more dangerous than the drug that was intended to be manufactured. This may lead to mistaken buyers overdosing or having other harmful reactions to the unknown or misrepresented drug. For example, in a three-month period in 2000, six deaths in Florida were attributed to dangerous variants of ecstasy. *Id.*

<sup>64</sup> *Hearings: America at Risk*, *supra* note 59 (statement of Donnie Marshall, Adm'r, Drug Enforcement Admin.). Furthermore, because the necessary precursor chemicals to making ecstasy are difficult to obtain in the United States, only a very small number of ecstasy laboratories have been seized within the United States. DRUG ENFORCEMENT ADMIN., DRUG TRAFFICKING IN THE UNITED STATES (2001) [hereinafter DEA: DRUG TRAFFICKING], <http://www.dea.gov/pubs/intel/01020/index.html> (last visited Feb. 25, 2005). However, many of the necessary precursor chemicals are legally available in Canada, and so clandestine ecstasy laboratories in Canada near the United States border have recently become a significant source of ecstasy consumed in the United States. *Id.*

<sup>65</sup> *See Hearings: Underestimating the Threat*, *supra* note 46 (statement of Rand Beers, Assistant Sec'y of State, Int'l Narcotics and Law Enforcement Affairs, Dep't of State).

<sup>66</sup> *Id.*

<sup>67</sup> *Hearings: America at Risk*, *supra* note 59 (statement of Donnie Marshall, Adm'r, Drug Enforcement Admin.). To date, only one ecstasy laboratory has been seized in Colombia. *Id.*

<sup>68</sup> *Id.* It remains to be seen what effect the diversification of and competition within the ecstasy trade will have on the level of violence associated with ecstasy trafficking. Traditionally, ecstasy trafficking and use have been associated with a comparatively low level of violence, with a 1999 survey showing that only 1.9% of convicted ecstasy traffickers received a sentencing enhancement for weapon involvement, compared to 21.6% for crack cocaine and 12.2% for drug trafficking in general. *See Hearings: America at Risk*, *supra* note 59 (statement of Diana Murphy, U.S. Sentencing Comm'n); *see also* OFFICE OF NAT'L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, PULSE CHECK: TRENDS IN DRUG ABUSE 81 (2001) [hereinafter PULSE CHECK], *available at* <http://www.whitehousedrugpolicy.gov/publications/drugfact/pulsechk/fall2001/fall2001.pdf> (last visited Feb. 25, 2005).

<sup>69</sup> *Hearings: RAVE Act*, *supra* note 19, at 8 (prepared statement of Andrea Craparotta, Investigator, Middlesex County Prosecutor's Office, N.J.).

trafficking patterns can change, but it appears that ecstasy will retain its distinctive characteristics for some time to come.<sup>70</sup>

## 2. Methamphetamine

Methamphetamine is a powerful stimulant, the common side effects of which include an intense rush of energy and alertness, sleeplessness, paranoia, hallucinations, and aggressive behavior—sometimes including out-of-control violent rages.<sup>71</sup> Withdrawal from methamphetamine use can bring on feelings of anxiety, aggression, and paranoia,<sup>72</sup> and use of this drug has been shown to create long-term brain damage similar to Alzheimer's disease, epilepsy, and strokes.<sup>73</sup>

Production of domestically-consumed methamphetamine takes place mostly in the western United States and Mexico.<sup>74</sup> Because the major precursor chemical to methamphetamine, pseudophedrine, is commercially produced within the United States for use in medicines, the primary supply of materials for methamphetamine production is through the purchase and diversion of this commercial production.<sup>75</sup> Previously, the production and trafficking of methamphetamine was controlled by “[i]ndependent laboratory operators, including outlaw motorcycle gangs,” but in recent years, Mexican organized crime has begun to play an increasingly significant role,<sup>76</sup> and importation of Asian methamphetamine in tablet form has risen significantly.<sup>77</sup>

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<sup>70</sup> *Hearings: America at Risk*, *supra* note 59 (statement of Donnie Marshall, Adm'r, Drug Enforcement Admin.).

<sup>71</sup> OFFICE OF NAT'L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, METHAMPHETAMINE (2004), at <http://www.whitehousedrugpolicy.gov/drugfact/methamphetamine/index.html> (last visited Feb. 25, 2005); JENNIFER LLOYD, EXECUTIVE OFFICE OF THE PRESIDENT, ONDCP DRUG POLICY INFORMATION CLEARINGHOUSE FACT SHEET: METHAMPHETAMINE 1 (2003) [hereinafter ONDCP: METHAMPHETAMINE], available at <http://www.whitehousedrugpolicy.gov/publications/pdf/ncj197534.pdf> (last visited Feb. 25, 2005). Common hallucinations caused by methamphetamine use include “crank bugs,” or the delusion that bugs are crawling under the user's skin. Users suffering from this delusion will often develop sores on their body by scratching at the illusory bugs. *Id.*

<sup>72</sup> ONDCP: METHAMPHETAMINE, *supra* note 71, at 1.

<sup>73</sup> News Release, Nat'l Institute on Drug Abuse, Methamphetamine Abuse Linked to Long-Term Damage to Brain Cells (Mar. 27, 2000), available at <http://www.nida.nih.gov/MedAdv/00/NR3-27.html> (last visited Feb. 25, 2005).

<sup>74</sup> DEA: DRUG TRAFFICKING, *supra* note 64.

<sup>75</sup> *Id.* Because methamphetamine production is structured atop the commercial production of precursor chemicals, this may contribute to a more consistent makeup and quality of methamphetamine produced, which can have implications on the adverse health effects of methamphetamine use. See *supra* note 63.

<sup>76</sup> DEA: DRUG TRAFFICKING, *supra* note 64. The relative ease of transporting the drug in passenger vehicles across the United States-Mexico border has made Mexico a prime location

### 3. Flunitrazepam (Rohypnol, or “Roofies”) and GHB

Both of these drugs are commonly referred to as “predatory drugs” or “date rape drugs” because criminals have used them to facilitate rape by unknowingly slipping the drug into the victim’s drink.<sup>78</sup> Both drugs tend to sedate and intoxicate users, making victims less able to resist their attacker, and often induce short-term memory loss that makes the reporting and prosecution of the crime more difficult.<sup>79</sup> Although these drugs have gained notoriety because of their association with this kind of crime, they are more commonly abused by non-violent offenders for their euphoric and intoxicating effects.<sup>80</sup> When used in excess, GHB can cause seizures, respiratory depression, and coma.<sup>81</sup>

Rohypnol is legally produced in over fifty countries outside the United States, where it is used as a prescription treatment for insomnia.<sup>82</sup> The commercially produced form of this drug is then smuggled into the United States, particularly through the Mexican border with California and Texas.<sup>83</sup> GHB is primarily manufactured and distributed domestically, since the precursor chemical to its production, GBL, is commercially produced within the United States for use in industrial cleaners.<sup>84</sup>

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for trafficking through California and Texas. *Id.*; see also UNITED STATES GENERAL ACCOUNTING OFFICE, DRUG CONTROL: DEA’S STRATEGIES AND OPERATIONS IN THE 1990S, REPORT TO CONGRESSIONAL REQUESTERS 20 (1999) [hereinafter DRUG CONTROL: DEA’S STRATEGIES], available at <http://www.gao.gov/archive/1999/gg99108.pdf> (last visited Feb. 25, 2005).

<sup>77</sup> DEA: DRUG TRAFFICKING, *supra* note 64.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See *id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*; OFFICE OF NAT’L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, CLUB DRUGS (2004) [hereinafter ONDCP: CLUB DRUGS], <http://www.whitehousedrugpolicy.gov/drugfact/club/index.html> (last visited Feb. 25, 2005).

<sup>83</sup> DEA: DRUG TRAFFICKING, *supra* note 64.

<sup>84</sup> *Id.* Although some health supplements containing GBL have been removed from the market, many have been reintroduced under new names containing an alternative precursor, 1,4 butanediol (BD), which is synthesized by the body to create GHB. DRUG ENFORCEMENT ADMIN., CLUB DRUGS: AN UPDATE (2001) [hereinafter DEA: CLUB DRUGS], <http://www.dea.gov/pubs/intel/01026/index.html> (last visited Feb. 25, 2005).

#### 4. Ketamine (Special K)

Like Rohypnol and GHB, Ketamine is a depressant and there are some reports of it being used as a date rape drug.<sup>85</sup> However, it is more commonly abused for the dissociative, dream-like states of auditory and visual hallucinations brought on by its use.<sup>86</sup> Excessive use of Ketamine can cause depression of the central nervous system, including respiratory depression and heart rate abnormalities, as well as long-term memory loss and depression.<sup>87</sup>

Within the United States, Ketamine is commercially produced and used as a dissociative general anesthetic by veterinarians and doctors.<sup>88</sup> Currently, the only known source of Ketamine is through the diversion of these pharmacological products.<sup>89</sup>

#### 5. LSD

Use of LSD declined after its peak in the 1960s and 1970s, but began a substantial rise in the mid-1990s, largely due to its inexpensive price and wide availability.<sup>90</sup> LSD is a powerful hallucinogen, and harmful effects of its use are generally associated with its mental, rather than physical effects.<sup>91</sup> However, LSD is not a physically addicting drug, so most users voluntarily reduce or stop its use over time.<sup>92</sup>

Production of domestic LSD takes place almost exclusively in the western United States, particularly in San Francisco and Northern California.<sup>93</sup> The production and trafficking organizations of LSD are highly developed and generally continue to elude drug enforcement pursuit.<sup>94</sup> Over time, these organizations have developed a mail-order system of distribution that hides the

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<sup>85</sup> DEA: CLUB DRUGS, *supra* note 84; ONDCP: CLUB DRUGS, *supra* note 82.

<sup>86</sup> ONDCP: CLUB DRUGS, *supra* note 82.

<sup>87</sup> *Id.*; DEA: CLUB DRUGS, *supra* note 84.

<sup>88</sup> DEA: CLUB DRUGS, *supra* note 84.

<sup>89</sup> *Id.*

<sup>90</sup> See DRUG ENFORCEMENT ADMIN., HALLUCINOGENS, *at* <http://www.usdoj.gov/dea/concern/hallucinogens.html> (last visited Feb. 25, 2005).

<sup>91</sup> See *id.*

<sup>92</sup> *Id.* Conversely, LSD does have a tolerance effect, such that habitual users must use increasingly large doses in order to obtain the same effect. *Id.*

<sup>93</sup> DEA: DRUG TRAFFICKING, *supra* note 64.

<sup>94</sup> *Id.* To date, only four LSD laboratories have been seized by the DEA. News Release, Drug Enforcement Admin., Pickard and Apperson Sentenced On LSD Charges: Largest LSD Lab Seizure In DEA History (Nov. 25, 2003), <http://www.usdoj.gov/dea/pubs/states/newsrel/sanfran112403.html> (last visited Feb. 25, 2005).

identity of buyers and sellers, giving each level of the organization increasing insulation from enforcement efforts.<sup>95</sup> User-end distribution of LSD is thought to focus on rock concerts, although its distribution and use have been increasingly linked to the rave scene.<sup>96</sup>

### *C. What it Means, and Does Not Mean, To Be a Club Drug*

Looking at this cross-section of substances commonly grouped under the label "club drugs," several observations are notable. First, these drugs differ widely in their subjective effects and in their adverse health consequences. Included in this makeshift group are stimulants, depressants, hallucinogens, and combinations thereof, with effects ranging from empathy to aggression and from depression to psychosis. Some pose the threat of acute physical harm to the user, others create the possibility of mental harm to the user, and still others are used to commit crimes against third parties. Even among the possible physical harms, the drugs vary widely: from hyperthermia to coma, and from short-term memory loss to long-term neurological damage. Such differences suggest that individual strategies in education and health management would be more effective than a collective program targeting an artificial grouping of drugs.

Second, the places and methods of production of these drugs are equally varied. Some drugs are manufactured legally within the United States and diverted for illegal use, while others are illegally manufactured from domestically legal precursor chemicals. Other drugs are illegally manufactured from illegal precursor chemicals, while still others are manufactured abroad and smuggled into the United States for distribution. Again, these differences suggest that an effective drug policy should be tailored to the specific nature of each drug.

Finally, the manner in which the drugs are trafficked into and distributed within the United States varies significantly. Geographically, these drugs vary when entering the United States, some making extensive use of the United States-Mexico border, others focusing on east-coast port cities, and still others being produced and distributed domestically. Furthermore, although major crime organizations are involved with all of these drugs to some degree, there is a notable distinction among the major traffickers, as between European, Asian, Mexican, Colombian, and domestic criminal organizations.<sup>97</sup> Obviously, an

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<sup>95</sup> DEA: DRUG TRAFFICKING, *supra* note 64.

<sup>96</sup> *Id.*

<sup>97</sup> As previously noted, the future of this distinction for ecstasy is uncertain, as Colombian and Mexican drug traffickers become more involved. At present, however, it seems likely that Russian and Israeli organizations will continue to control the ecstasy trade. See *supra* note 68 and accompanying text.

effective program to address the abuse of these drugs must take these differences into account as well.

In light of these three observations, the limited nature of the similarities among this artificial grouping of substances is apparent. As the title "club drugs" itself discloses, all that these substances seem to have in common is that they are frequently used in the settings of nightclubs and raves. But does this association hold up under current evidence? And whether or not it does, can it justify the particular legislative and executive attempts that have been made to address drug use in these settings?

Both anecdotal and statistical findings show that many attendees of nightclubs and raves use one or more of these club drugs during an event, often combining several drugs at once.<sup>98</sup> But whereas the use of these drugs was previously believed to be relatively confined to these events, their use has now expanded beyond the rave scene and into mainstream culture.<sup>99</sup> Testifying before the Senate Judiciary Caucus on International Narcotics Control, the Deputy Director of the Office of National Drug Control Policy stated that "[u]se of the drug is often associated with the underground 'Rave' youth subculture, but in truth is a problem anywhere young people congregate. Drug marketers don't target a place; they target kids."<sup>100</sup> Geographically, use of these drugs has spread out from large cities to rural areas,<sup>101</sup> and culturally, it has spread beyond the rave scene to African-American and Hispanic youth.<sup>102</sup> So while it is true that drug use at nightclubs and raves continues to be common, the dispersion and diversification of the use of club drugs undermines the assumptions behind the notion of treating these substances as a group, as well as the overall efficacy of any enforcement program targeted at drug use only in these settings.<sup>103</sup>

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<sup>98</sup> See *Hearings: Underestimating the Threat*, *supra* note 46 (statement of Richard A. Fiano, Chief of Operations, Drug Enforcement Admin.); *Hearings: America at Risk*, *supra* note 59 (statement of Donnie Marshall, Adm'r, Drug Enforcement Admin.).

<sup>99</sup> *Hearings: America at Risk*, *supra* note 59 (statement of Donald R. Vereen, Jr., Deputy Dir., Office of Nat'l Drug Control Policy) ("Use is no longer confined to the rave scene: the sale and use of club drugs has expanded from nightclubs and raves to high schools, the streets, neighborhoods, and open venues."); see also PULSE CHECK, *supra* note 68, at 82, 84.

<sup>100</sup> *Hearings: Underestimating the Threat*, *supra* note 46 (statement of Donald R. Vereen, Jr., Deputy Dir., Office of Nat'l Drug Control Policy).

<sup>101</sup> *Id.*

<sup>102</sup> *Hearings: America at Risk*, *supra* note 59 (statement of Donald R. Vereen, Jr., Deputy Dir., Office of Nat'l Drug Control Policy).

<sup>103</sup> In other words the parallel rise in ecstasy use and raves in Europe is relatively well established; but because ecstasy and other club drugs have moved beyond this limited venue, a reduction in raves is not likely to have a parallel reduction in club drug abuse. See DEA: RAVES, *supra* note 48; PULSE CHECK, *supra* note 68, at 82.



However, in the past three years there have been a number of legislative acts (both passed and proposed) and executive enforcement measures targeting the activity of rave promoters and attendees. These actions have raised substantial public concern because of the perception that the government is not trying to target individual drug dealers and users at raves and nightclubs, but is instead simply trying to shut down raves as *venues* for possible drug use by holding their owners and promoters liable for the drug activity of attendees.<sup>104</sup> The remaining question, therefore, is whether this public concern is warranted, or whether these measures are justified as a legitimate and effective method of addressing the abuse of these drugs. But before considering this question in detail, it is important to outline the particular policies and actions that have given rise to this concern.

### III. EXECUTIVE POLICIES EXPANDING LIABILITY BEYOND DIRECT INVOLVEMENT IN DRUG ACTIVITY

As the problem of drug abuse at nightclubs and raves became more widespread and gained notoriety, law enforcement across the country began to respond. However, traditional efforts to address drug use in these settings proved to be less effective than in previous settings, due in part to the notably young age of many drug users and sellers at these events.<sup>105</sup> Law enforcement policy often prohibits the use of juveniles as informants, and where it does not, parents are often unwilling to let their children participate for fear of their safety—undermining the ability of law enforcement officers to uncover the identity of drug dealers.<sup>106</sup> Furthermore, the young age of buyers and sellers of club drugs means that “[a]dult officers most likely cannot purchase, nor infiltrate the organizations responsible for the distribution of these substances.”<sup>107</sup> Faced with this difficulty in confronting a continually rising problem from the user-end up,<sup>108</sup>

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<sup>104</sup> See, e.g., Montgomery, *supra* note 43.

<sup>105</sup> See *Hearings: America at Risk*, *supra* note 59 (statement of Steven Rust, Sergeant, Milford, Del. Police Dep’t). As of 1999, use of ecstasy was highest among 18 to 25 year-olds, with 8% of teenagers reporting to have used the drug in their lifetime. *Hearings: Underestimating the Threat*, *supra* note 46 (statement of Donald R. Vereen, Jr., Deputy Dir., Office of Nat’l Drug Control Policy). Furthermore, ecstasy traffickers tend to be much younger than traffickers of other drugs, with “[o]ver one-third of the federal offenders sentenced for ecstasy trafficking in fiscal year 2000 [falling] between the ages of 21 and 25 years old.” *Hearings: America at Risk*, *supra* note 59 (statement of Diana Murphy, Judge, U.S. Sentencing Comm’n).

<sup>106</sup> See *Hearings: America at Risk*, *supra* note 59 (statement of Steven Rust, Sergeant, Milford, Del. Police Dep’t).

<sup>107</sup> *Id.*; see Clements, *supra* note 23.

<sup>108</sup> Testimony from the Director of Florida’s Office of Drug Control suggests that traditional supply-end reduction tactics remain effective in addressing the abuse of these drugs.

law enforcement agencies began to adapt their existing arsenal of laws and tactics for use in this new environment.<sup>109</sup> Rather than limit liability to those directly involved in drug activity, they began to take action against rave promoters, attendees, and raves in general.

### *A. State and Local Enforcement Initiatives Targeting Rave Activity*

One of the steps taken by local law enforcement agencies has been to try to shut down raves by strictly and broadly enforcing “juvenile curfews, fire codes, health and safety ordinances, liquor laws, and licensing requirements for large public gatherings.”<sup>110</sup> Although this kind of approach has been successful in reducing rave activity, the degree to which this actually decreases drug usage or simply moves it to new areas is unclear.<sup>111</sup>

Apart from preventing raves from occurring, another method has been to directly charge the promoters, attendees, or performers at raves under city ordinances. The most infamous example of this approach occurred in November of 2001, where police officers in Racine, Wisconsin issued fines of \$968 to over 440 attendees of a local fundraiser featuring electronic music.<sup>112</sup> In that case, the

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Florida’s policy, combining heightened sentencing for drug trafficking with increased efforts to seize drugs as they enter the country, has been effective in reducing the supply of drugs and has lowered drug use among teenagers. See *Hearings: America at Risk*, *supra* note 59 (statement of Jim McDonough, Dir., Fla. Office of Drug Control).

<sup>109</sup> See INFORMATION BULLETIN: RAVES, *supra* note 50, at 5.

<sup>110</sup> *Id.* This approach has been pursued with particular vigor in New York and San Francisco, where many rave and nightclub owners have had their liquor licenses revoked. See Janelle Brown, *Your Glow Stick Could Land You in Jail*, Apr. 16, 2003, at <http://archive.salon.com/mwt/feature/2003/04/16/rave/> (last visited Feb. 25, 2005). In response, a political action group called the San Francisco Late Night Coalition (<http://www.sflnc.org/>) has formed to preserve the city’s night life. *Id.* Similarly, South Carolina and Hartford, Connecticut have used health codes and nuisance suits to shut down rave activity. See *Hearings: Looking the Other Way*, *supra* note 11 (testimony of Asa Hutchinson, Adm’r, Drug Enforcement Admin.).

<sup>111</sup> INFORMATION BULLETIN: RAVES, *supra* note 50, at 5. In some situations, moving raves outside the reach of these ordinances may mean that alternative venues, such as abandoned warehouses or open fields, will not have facilities such as running water and air conditioning, or close proximity to health care facilities that reduce the adverse health effects of drug use. See *supra* Part V.B.1; *Hearings: RAVE Act*, *supra* note 19, at 24 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU).

<sup>112</sup> See Tom Kertscher, *Rave-Goers Achieve Victory in Racine*, MILWAUKEE J. SENTINEL, Jan. 17, 2003, at A1, available at <http://www.jsonline.com/news/racine/jan03/111280.asp> (last visited Feb. 25, 2005); Drug Policy Alliance, *After ACLU Action, Police Dismiss Citations Against Hundreds of Electronic Music Concertgoers in Wisconsin*, Jan. 16, 2003, at

Uptown Theater Group, Inc. held a benefit event in a local bar to raise money to restore “an historic landmark theater.”<sup>113</sup> Undercover officers at the event called the police after seeing some evidence of drug activity, and uniformed officers subsequently arrived and ticketed virtually everyone at the event.<sup>114</sup>

Despite the fact that there were only three arrests made for drug possession, over 440 attendees were charged with violating the city’s “disorderly house” ordinance, which made it unlawful to “knowingly” patronize a place “which is used for the purpose of unlawfully selling, serving, storing, keeping or giving away controlled substances.”<sup>115</sup> It is unclear in what manner all of these attendees were purported to have this knowledge—from their personal interaction with the three arrested drug dealers or merely from the kind of music being played and the clothes being worn. Ultimately, all of these charges were dropped,<sup>116</sup> but the incident quickly gained notoriety as a clear signal of the emerging law enforcement mentality toward raves and electronic music events.<sup>117</sup>

### B. Federal Law Enforcement Actions under 21 U.S.C. § 856

In a move paralleling state and local authorities, federal law enforcement agencies have also adapted existing laws to address the problem of drug abuse at

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<http://www.aclu.org/DrugPolicy/DrugPolicy.cfm?ID=11628&c=185> (last visited Feb. 25, 2005).

<sup>113</sup> Drug Policy Alliance, *supra* note 112.

<sup>114</sup> See Kertscher, *supra* note 112.

<sup>115</sup> Racine Mun. Code § 66-346 (2002), available at [http://www.municode.com/resources/code\\_list.asp?stateID=49](http://www.municode.com/resources/code_list.asp?stateID=49) (last visited Feb. 25, 2005). This ordinance was repealed and recreated in 2003. For excerpts from the original text, see Letter from Graham Boyd, ACLU Drug Policy Litig. Project & Mike Diaz, ACLU of Wis., to Wright, Racine City Attorney (Nov. 25, 2002), <http://www.aclu.org/DrugPolicy/DrugPolicy.cfm?ID=11661&c=185> (last visited Feb. 25, 2005).

<sup>116</sup> See Kertscher, *supra* note 112. In response to the unsurprising protests of the charged attendees, the assistant city attorney attempted to “defuse” the situation by reducing the fine to \$100 and by later removing any reference to drugs in the citations. *Id.* But most of the accused refused to enter into plea agreements and demanded a trial, and the ACLU threatened a class action suit if the charges were pursued. Although the city finally dropped the charges to prevent any such suits, city officials still believed the incident helped deter parties with illegal drug use. *Id.*

<sup>117</sup> *Id.* In a surprising move, the Racine City Council repealed and recreated their disorderly house ordinance on February 19, 2003, making it directly applicable to raves and entertainment events. The new ordinance no longer requires that a place be used “for the purpose” of drug activity, but only that it be a place which is “not generally open to the public in which there is substantial evidence of” drug activity. See Racine Mun. Code § 66-346; see also Minutes of Racine City Council Chamber, Feb. 19, 2003, at 7, [http://www.cityofracine.org/CityGov/commoncouncil/2003/COUNCIL\\_MINUTES\\_03-02-19.pdf](http://www.cityofracine.org/CityGov/commoncouncil/2003/COUNCIL_MINUTES_03-02-19.pdf) (last visited Feb. 25, 2005).

raves and nightclubs. Primarily, this has been done through 21 U.S.C. § 856, also known as the crack house law.<sup>118</sup> As originally enacted and applied, this law made it unlawful to:

- (1) knowingly open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance;
- (2) manage or control any building, room, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, and knowingly and intentionally rent, lease, or make available for use, with or without compensation, the building, room, or enclosure for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.<sup>119</sup>

The Department of Justice identified a five-step process to help law enforcement officers apply this law effectively, the first step of which is to "[i]dentify rave promoters."<sup>120</sup> According to this suggested process, "[p]otential subjects for investigation included all parties responsible for managing the production and promotion of the raves, including the owners of the property where the event was held."<sup>121</sup> Second, records from emergency medical services showing transportation of rave attendees to emergency rooms should be compiled.<sup>122</sup> Third, undercover officers should conduct operations during an event and attempt to film the prevalence of drug use, the actions of security personnel, the purchase of drug paraphernalia, and "ravers using drugs and using the paraphernalia to enhance or manage the effects of the drugs."<sup>123</sup> Fourth, undercover agents should apply for security positions and document the promoter's expectations on enforcement of drug laws.<sup>124</sup> Finally, law enforcement should execute search warrants at the homes of rave promoters and attempt to find any items relating to their promotion of raves, including advertisements, purchase orders for "rave paraphernalia, water, and other stock," and documents detailing the responsibilities of security personnel.<sup>125</sup>

In theory, guidelines such as these may help establish the direct responsibility of a promoter for facilitating the use of drugs—particularly evidence as to the promoter's expectations on the enforcement of drug laws. But in practice, as

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<sup>118</sup> This law was recently amended by the Illicit Drug Anti-Proliferation Act, but the government's attempt to use this law to target rave activity predates these amendments. *See* Part IV.B.

<sup>119</sup> 21 U.S.C. § 856(a) (2000).

<sup>120</sup> *See* INFORMATION BULLETIN: RAVES, *supra* note 50, at 5.

<sup>121</sup> *Id.* at 5–6.

<sup>122</sup> *Id.* at 6.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

applied by the Drug Enforcement Administration (DEA), they may actually do little to distinguish criminal promoters, who are intentionally profiting off drug use at their events, from legitimate promoters, who are simply running an event where it is likely that drug abuse will occur despite their precautions. As evidence of how this law may be used to target legitimate business owners and ultimately hold them liable for the drug use of their patrons, critics cite the events surrounding the State Palace Theater in New Orleans.<sup>126</sup>

The State Palace Theater is host to a large number of electronic music events, and even though it had instituted a zero-tolerance policy toward drug use, the owner and promoter were both charged under 21 U.S.C. § 856.<sup>127</sup> This policy included offering a free ticket to anyone who turned in a person with drugs, instructing security guards to refuse admission to intoxicated individuals, detaining drug users and arranging for their arrest,<sup>128</sup> and facilitating the arrest of many drug sellers—including security guards employed by the State Palace Theater.<sup>129</sup> Furthermore, the owner had specifically invited undercover DEA officers into events, allowed them to pose as security officers, and even helped to disguise them as "ravers."<sup>130</sup> However, after conducting an extensive undercover investigation of the State Palace Theater,<sup>131</sup> the DEA decided not to pursue any

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<sup>126</sup> See, e.g., *Hearings: RAVE Act*, *supra* note 19, at 21–23 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU). In contrast, proponents of the Illicit Drug Anti Proliferation Act cite this case as an example of the shortcomings of this statute, calling for the law to be more narrowly tailored to a rave setting. See, e.g., 149 CONG. REC. S1678 (daily ed. Jan. 28, 2003) (statement of Sen. Biden).

<sup>127</sup> See *Hearings: RAVE Act*, *supra* note 19, at 21–23 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU); see also *United States v. Brunet*, No. 01-CR-10 (E.D. La. Jan. 12, 2001).

<sup>128</sup> See *Hearings: RAVE Act*, *supra* note 19, at 22 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU). Ironically, in a number of instances, the police or DEA ignored such notifications of detainees, and the theater had to destroy the drugs and release the individuals. *Id.*; see also Memorandum of Points and Authorities in Support of Defendants James Estopinal and Brian Brunet's Motion to Dismiss the Indictment at 7–8, *Brunet* (No. 01-CR-10) [hereinafter *Brunet Motion to Dismiss*], available at <http://www.emdef.org/pdf/brunet.pdf> (last visited Feb. 25, 2005).

<sup>129</sup> See *Hearings: RAVE Act*, *supra* note 19, at 22 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU). On multiple occasions, the theater had also requested the assistance of the New Orleans Police Department to prevent drug use during raves, but each of these requests was denied. *Id.*; see also *Brunet Motion to Dismiss*, *supra* note 128, at 7–8.

<sup>130</sup> *Brunet Motion to Dismiss*, *supra* note 128, at 7.

<sup>131</sup> See *McClure v. Ashcroft*, 335 F.3d 404, 406 (5th Cir. 2003). This investigation lasted from 1999 until the DEA raided the State Palace Theater in August 2000. During this time, the DEA made fifty purchases of controlled substances. Furthermore, the investigation showed that in the period from December 1997 to March 2000, over seventy attendees were sent to a hospital for drug overdoses, and one seventeen year-old had died. *Id.*

charges against any drug users or sellers, but instead arrested the proprietors, Robert and Brian Brunet, and the promoter, James Estopinal, under the crack house law.<sup>132</sup> These charges were later dismissed, but the government also brought suit against the company managing the State Palace Theater, Barbeque of New Orleans, Inc. (Barbeque), for conspiracy to violate 21 U.S.C. § 856(a)(2).<sup>133</sup> This case was settled by a plea agreement that required Barbeque, the Brunets, and other associated businesses to take a number of measures to restrict the admission, use, or sale of items regarded as drug paraphernalia.<sup>134</sup> Included among these items are “pacifier[s], objects that glow . . . vapor rub products . . . [and] masks of any description.”<sup>135</sup> In addition to this, the parties to the plea agreement may not provide “masseurs, massage tables, or ‘chill rooms’ (kept 15 degrees cooler than the rest of the building),” and must contact the police if they or any employees witness the use or sale of drugs.<sup>136</sup>

At no point in the proceedings did the government allege that the owners or promoters of this establishment either encouraged or condoned drug use, much less that they were directly involved in using or selling controlled substances.<sup>137</sup> To the contrary, it is difficult to imagine what more they could have done to prevent or deter drug use during their events, apart from shutting them down completely.

But this was not an isolated incident. Almost simultaneously with this case, the DEA was pursuing similar charges against the owners and promoters of Club La Vela in Panama City Beach, Florida.<sup>138</sup> Again, police conducted a lengthy,

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<sup>132</sup> See *McClure v. Ashcroft*, No. 01-CV-2573-T, 2002 U.S. Dist. LEXIS 2532, at \*3 (E.D. La. Feb. 1, 2002); *Hearings: RAVE Act*, *supra* note 19, at 21–23 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU).

<sup>133</sup> *United States v. Barbeque of New Orleans, Inc.*, No. 01-CR-153 (E.D. La. Aug. 23, 2001), available at [http://www.emdef.org/pdf/NOLA\\_FactualBasis.pdf](http://www.emdef.org/pdf/NOLA_FactualBasis.pdf) (last visited Feb. 25, 2005). Robert and Brian Brunet are corporate officers of Barbeque. See *McClure*, 335 F.3d at 406.

<sup>134</sup> *McClure*, 335 F.3d at 406.

<sup>135</sup> *Id.* This part of the plea agreement was initially struck down as violating the right to free speech, after a group of artists who use the prohibited items in their performances brought a third-party challenge to the plea agreement. The district court enjoined enforcement of this provision because it found that the state could not force persons, via a plea agreement, to refrain from using lawful items in artistic, expressive communication. *McClure*, 2002 U.S. Dist. LEXIS 2532, at \*17. However, this decision was vacated when the court of appeals decided that in a civil suit, a third party challenge to a criminal plea agreement is nonjusticiable. *McClure*, 335 F.3d at 414.

<sup>136</sup> *McClure*, 335 F.3d at 406–07.

<sup>137</sup> See *Hearings: RAVE Act*, *supra* note 19, at 22 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU).

<sup>138</sup> The DEA raided the State Palace Theater in August 2000, *McClure*, 335 F.3d at 406, and raided Club La Vela in April 2000, Clements, *supra* note 23.

expensive investigation of the premises, and having failed to find any evidence of the owners or promoters being directly involved in drug activity, they nevertheless arrested them and charged them under the crack house law.<sup>139</sup> While authorities also arrested a number of drug users and sellers in the course of this investigation, they decided to forego prosecuting them so that they would testify against the owners and promoters.<sup>140</sup> In the end, the jury needed only seventy-five minutes to acquit the defendants of all charges.<sup>141</sup>

On the surface, it appears that in both these instances the DEA followed the five-step procedure suggested by the Department of Justice.<sup>142</sup> But unfortunately, despite the fact that the DEA did not find any evidence that the owners and promoters of the State Palace Theater or Club La Vela were involved with drug activity,<sup>143</sup> they were not deterred from bringing charges in either case. It is in response to incidents such as these in New Orleans, Panama City Beach, and Racine that concerned organizations<sup>144</sup> have mobilized to help ensure that federal, state, and local authorities continue to enforce laws responsibly, and to discuss the extent to which this form of secondary liability should be pursued as a solution to the abuse of club drugs.<sup>145</sup>

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<sup>139</sup> See Mike Cazalas, *Bay Watch: Sun Still Rises Over La Vela*, NEWS HERALD (Panama City Beach, Fla.), Dec. 1, 2001, at B2. Club La Vela also had a zero-tolerance policy for drug use, and was actually criticized for how often they called the police to pick up drug offenders. Defendants Motion to Dismiss Indictment for Facial Unconstitutionality with Incorporated Memorandum of Law at 6–7 & n.1, *United States v. Pfeffer*, (N.D. Fla. 2001) (No. 5-01-CR-07-RH) [hereinafter *Pfeffer Motion to Dismiss*], available at [http://www.emdef.org/clublavela/070001\\_LaVela\\_m\\_dismiss.pdf](http://www.emdef.org/clublavela/070001_LaVela_m_dismiss.pdf) (last visited Feb. 25, 2005).

<sup>140</sup> See Cazalas, *supra* note 139. The owners of Club La Vela argue that the \$30 million forfeiture of the club—one of the largest clubs in the nation—was a motivating factor in bringing the charges. *Pfeffer Motion to Dismiss*, *supra* note 139, at 23.

<sup>141</sup> See Angier, *supra* note 26.

<sup>142</sup> See INFORMATION BULLETIN: RAVES, *supra* note 50, at 5–6.

<sup>143</sup> See Brunet Motion to Dismiss, *supra* note 128, at 8; *Pfeffer Motion to Dismiss*, *supra* note 139, at 8.

<sup>144</sup> The ACLU has a special group called the Drug Policy Alliance (<http://www.drugpolicy.org/>) for issues of drug control policies, and also helped to set up the Electronic Music Defense & Education Fund (<http://www.emdef.org/>) in response to the State Palace Theater case. Also, the Ravers Against Opposition to Raves (ROAR) has coordinated protests in Washington, D.C. over the RAVE Act. See *Ravers Against Opposition to Raves (ROAR)*, TalkLeft, Sept. 18, 2003, at [http://talkleft.com/new\\_archives/003749.html](http://talkleft.com/new_archives/003749.html) (last visited Feb. 25, 2005).

<sup>145</sup> Ironically, the federal government has recently found itself on the receiving end of this same theory of liability. The family members of five persons killed in a car accident after attending a rave held on government lands and under a permit issued by the U.S. Forest Service have sued the U.S. Department of Agriculture and the U.S. Forest Service for wrongful death. See Ben Goad, *Government Sued In Post-Rave Deaths: Legislation: The Filing of the*

#### IV. CONGRESSIONAL ACTS EXPANDING LIABILITY BEYOND DIRECT INVOLVEMENT IN DRUG ACTIVITY

Since 2001, four bills have been introduced in Congress to address the problem of drug abuse at raves and nightclubs.<sup>146</sup> What makes these bills unique—and, consequently, what has drawn much public criticism—is that they do not target individual drug users or traditional drug dealing activity at raves, but are aimed at the owners and promoters of raves and nightclubs.<sup>147</sup> Whereas existing laws criminalize the direct sale or possession of controlled substances (regardless of the location or identity of the user or seller),<sup>148</sup> these bills generally seek to extend criminal and civil liability to owners and promoters of raves and nightclubs for their responsibility in facilitating the sale of controlled substances.

##### A. *The Ecstasy Prevention Act*

As the first bill to confront the problem of drug abuse at raves, the Ecstasy Prevention Act<sup>149</sup> was a rather indirect, but candid attempt to shut down raves in general. This bill gave financial incentives to local communities to prevent raves from occurring by granting priority in awarding federal public health awards to “communities that have taken measures to combat club drug use.”<sup>150</sup> According to the statute, such measures include “passing ordinances restricting rave clubs . . . and seizing lands under nuisance abatement laws to make new restrictions on an establishment’s use.”<sup>151</sup> This would mean essentially re-zoning a seized location to forbid raves.

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*Complaint Coincides with Protests Against a New Anti-Drug Law*, THE PRESS ENTERPRISE (Riverside, Cal.), May 31, 2003, at A1, LEXIS, News & Business, Press Enterprise File. Toxicology reports showed that all five individuals had used controlled substances. *Id.* According to the family members, the government should have known the dangers of allowing a rave to be held on its property, and is therefore liable for the harms that result from those foreseeable dangers. *Id.* However, the toxicology reports also showed that the driver was not intoxicated at the time of the crash and merely lost control of his vehicle on a dangerous mountain road. *Id.* The promoter of the event, Brett Ballou, has also been sued for \$35 million by the families. Pelisek, *supra* note 12. In a similar case, the family of the victim of an ecstasy overdose has sued the Circus Disco & Arena in Hollywood, alleging that it is liable for wrongful death because it failed to control drug activity on its property. *Id.*

<sup>146</sup> Ecstasy Prevention Act of 2001, H.R. 2582, 107th Cong. (2001); RAVE Act, S. 2633, 107th Cong. (2002); CLEAN-UP of Methamphetamines Act, H.R. 834, 108th Cong. (2003); Ecstasy Awareness Act of 2003, H.R. 2962, 108th Cong. (2003).

<sup>147</sup> See, e.g., Montgomery, *supra* note 43.

<sup>148</sup> See, e.g., 21 U.S.C. § 841(a) (2000).

<sup>149</sup> H.R. 2582; S. 1208, 107th Cong. (2001).

<sup>150</sup> H.R. 2582 § 3.

<sup>151</sup> *Id.*



Although the Ecstasy Prevention Act was introduced in both houses of Congress and was added as a rider to a Justice Department Appropriations bill, it was never passed.<sup>152</sup> At the time, the bill drew some criticism for "profiling" raves and electronic music rather than directly addressing drug usage,<sup>153</sup> but because the bill has not been reintroduced following its death, public concern over its implications has been relatively quiet, and the focus has shifted to the following three acts.

### B. *The RAVE Act (or the Illicit Drug Anti-Proliferation Act)*

On June 18, 2002, Senator Biden introduced a bill known as the RAVE Act<sup>154</sup> which has since become the center of a flurry of harsh criticism by rave promoters and nightclub owners, as well as fans of electronic music and the rave scene.<sup>155</sup> Although the bill is a rather technical amendment to the existing crack house law,<sup>156</sup> what seems to have incited substantial public opposition to this bill (and its future incarnations) was its rather inflammatory title and a set of "findings" included in the bill that accused raves of being "little more than a way to exploit American youth."<sup>157</sup> In addition, these "findings" concluded that "[t]he trafficking and use of 'club drugs' . . . is deeply embedded in the rave culture"<sup>158</sup> and accused rave promoters of intentionally profiting off drug use by selling bottled water and various lexicons of the rave subculture such as glow sticks, massage oils, and pacifiers.<sup>159</sup>

In response to the surprisingly effective public awareness actions of civil liberties groups and electronic music organizations, neither the Senate bill nor the

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<sup>152</sup> See 21st Century Department of Justice Appropriations Authorization Act, H.R. 2215, 107th Cong. §§ 8001–07 (2001). This portion of the Justice Department Appropriations bill was removed in conference committee proceedings. 148 CONG. REC. S9699–700 (daily ed. Oct. 1, 2002) (statement of Sen. Graham).

<sup>153</sup> See, e.g., Tara Ramroop, *Groups Criticize Ecstasy Bill in U.S. Senate*, UNIVERSITY WIRE, Jan. 25, 2002, at C1.

<sup>154</sup> RAVE Act, S. 2633, 107th Cong. (2002).

<sup>155</sup> See, e.g., Montgomery, *supra* note 43.

<sup>156</sup> 21 U.S.C. § 856 (2000).

<sup>157</sup> S. 2633 § 2(5); see Brown, *supra* note 110.

<sup>158</sup> S. 2633 § 2(3).

<sup>159</sup> *Id.* § 2(6)–(7). These "findings" link all of these items to aspects of drug use, but ignore their practical value or their role as a means of socially identifying oneself with a particular subculture. See *supra* note 50. As Senator Biden later recognized when removing the "findings" section, there are legitimate reasons for these actions, and they should not be used as factors in determining legal culpability. 149 CONG. REC. S1678 (daily ed. Jan. 28, 2003) (statement of Sen. Biden).

identical House bill<sup>160</sup> made it to a floor vote before the congressional session ended.<sup>161</sup> However, opponents of the bill could hardly breathe a sigh of relief before the bill was resurrected in the following session, this time sporting a new (much less catchy) name—The Illicit Drug Anti-Proliferation Act of 2003 (IDAPA)—and shedding its controversial “findings” section.<sup>162</sup> This time, to circumvent the rising public opposition, Senator Biden attached his bill to the popular PROTECT Act<sup>163</sup> while it was in conference committee.<sup>164</sup> Under the sheltering wings of the PROTECT Act, Biden’s bill sailed through Congress with only a whisper of recognition or opposition.<sup>165</sup>

Throughout the legislative history of this bill, the operative portions remained the same. Primarily, these consist of three alterations to the crack house law. First, that statute previously made it illegal to “knowingly open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance.”<sup>166</sup> Under the new law, coverage will include those who “open, lease, rent, use, or maintain any place, whether permanently or temporarily” for the restricted purpose.<sup>167</sup> The purpose of adding the “permanently or temporarily” language was apparently to help clarify that the law is intended “to apply not just to ongoing drug distribution operations, but to single-event activities, such as a party where the promoter sponsors the event with the purpose of distributing Ecstasy or other illegal drugs.”<sup>168</sup>

Second, the IDAPA replaced a former subsection of the crack house law that made it illegal to

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<sup>160</sup> RAVE Act, H.R. 5519, 107th Cong. (2002).

<sup>161</sup> See Brown, *supra* note 110.

<sup>162</sup> S. 226, 108th Cong. (2003). The bill was reintroduced in the House under its former title, but the House version also removed the “findings” section. See RAVE Act of 2003, H.R. 718, 108th Cong. (2003).

<sup>163</sup> Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 [PROTECT Act], Pub. L. No. 108-21, § 608, 117 Stat. 650, 691 (2003). This bill is also known as the “Amber Alert” bill, and generally addresses the sexual exploitation of children. *Id.*

<sup>164</sup> See Brown, *supra* note 110.

<sup>165</sup> Although a few members of Congress did indicate some reservations about the addition, these were far too sparse to have any effect on the passage of the bill. See 149 CONG. REC. S5334 (daily ed. Apr. 11, 2003) (statement of Sen. Bingaman); 149 CONG. REC. S5147-48 (daily ed. Apr. 10, 2003) (statement of Sen. Leahy); 149 CONG. REC. H3072-73 (daily ed. Apr. 10, 2003) (statement of Rep. Kilpatrick). Even members who specifically came out against the addition of the IDAPA still voted for the PROTECT Act. See Bracelin, *supra* note 13.

<sup>166</sup> 21 U.S.C. § 856(a)(1) (2000).

<sup>167</sup> PROTECT Act § 608(b)(1)(A).

<sup>168</sup> 148 CONG. REC. S10,218 (daily ed. Oct. 9, 2002) (statement of Sen. Biden).

manage or control any *building, room, or enclosure*, either as an owner, lessee, agent, employee, or mortgagee, and knowingly and intentionally rent, lease, or make available for use, with or without compensation, the *building, room, or enclosure* for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.<sup>169</sup>

Under Senator Biden's new bill, that section is replaced with one that makes it unlawful to

manage or control any *place, whether permanently or temporarily*, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the *place* for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.<sup>170</sup>

Again, the "permanently or temporarily" language is intended to make the law encompass one-time events as well as on-going drug activity.<sup>171</sup> In addition to this, the substitution of "place" for "building, room, or enclosure" was intended to make the law apply to "outdoor as well as indoor venues."<sup>172</sup> While these two changes appear rather technical, opponents found them nonetheless objectionable as a symbolic message that—just as Congress was turning its legislative eyes toward the rave scene—drug enforcement agencies would likely use this law in a discriminatory manner against the electronic music community.<sup>173</sup>

The third change to the crack house law adds a new section creating civil penalties for violations of either of the above sections.<sup>174</sup> This change means that owners and promoters may be found guilty of violations by a preponderance of the evidence standard instead of beyond a reasonable doubt, and that accused parties may not have the right to a trial by jury. And in addition to this, the penalties imposed are substantial: civil liabilities can be up to the greater of \$250,000 or two times the gross receipts from the offender's violation.<sup>175</sup>

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<sup>169</sup> 21 U.S.C. § 856(a)(2) (2000) (emphasis added).

<sup>170</sup> PROTECT Act § 608(b)(1)(B) (emphasis added).

<sup>171</sup> 148 CONG. REC. S10,218 (daily ed. Oct. 9, 2002) (statement of Sen. Biden).

<sup>172</sup> *Id.* Raves are often held in open fields, and thus otherwise liable promoters might avoid liability under the Act as previously written. *See id.*; *Hearings: Looking the Other Way*, *supra* note 11 (statement of Asa Hutchinson, Adm'r, Drug Enforcement Admin.).

<sup>173</sup> *See Brown*, *supra* note 110. While the crack house law had previously been applied to several owners and promoters of raves and nightclubs, the changes made to this statute under the IDAPA were specifically intended to tailor the statute to be more easily and effectively applied in this new context. *See* 149 CONG. REC. S1679 (daily ed. Jan. 28, 2003) (statement of Sen. Biden).

<sup>174</sup> PROTECT Act § 608(c).

<sup>175</sup> *Id.*

The remaining parts of the crack house law remained intact. These sections impose severe criminal penalties: up to twenty years in prison, up to a \$500,000 fine for individuals, and up to a \$2,000,000 fine for corporations.<sup>176</sup> Furthermore, persons convicted under the crack house law forfeit the property used in commission of the crime to the government.<sup>177</sup>

### *C. The CLEAN-UP of Methamphetamines Act*

While the IDAPA has received most of the media attention on the subject of rave legislation,<sup>178</sup> the CLEAN-UP of Methamphetamines Act<sup>179</sup> is a much more direct and overt attempt to hold promoters and owners of entertainment events liable for the drug use of their attendees. The considerable force and relative simplicity of this Act is apparent from its text:

Whoever, for a commercial purpose, knowingly promotes any rave, dance, music, or other entertainment event, that takes place under circumstances where the promoter knows or reasonably ought to know that a controlled substance will be used or distributed in violation of Federal law or the law of the place where the event is held, shall be fined under title 18, United States Code, or imprisoned for not more than 9 years, or both.<sup>180</sup>

Given the obvious fact that most entertainment promoters do not work pro bono, but seek to make a profit on their events, the only operative element of this Act is the promoter's knowledge—or constructive knowledge—that attendees are using drugs at an event. Considering the vagueness of this standard and its sweeping implications for the entertainment industry, as well as the substantial sentence imposed, it is surprising that this Act has not received more public criticism. However, these possible impacts may explain its inability to come to a floor vote in either house of Congress on three separate occasions.<sup>181</sup>

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<sup>176</sup> 21 U.S.C. § 856(b) (2000).

<sup>177</sup> See 21 U.S.C. § 853 (2000); see also 21 U.S.C. § 856(e) (2000).

<sup>178</sup> Although this may be in part due to the catchier name of this bill's predecessor, it is also likely that there is some confusion in the media among these bills. Senator Biden has repeatedly implied that opponents of his bill are mistaking it for either the CLEAN-UP of Methamphetamines Act or the Ecstasy Awareness Act. See, e.g., 149 CONG. REC. S10,607 (daily ed. July 31, 2003) (statement of Sen. Biden); 149 CONG. REC. S5153 (daily ed. Apr. 10, 2003) (statement of Sen. Biden).

<sup>179</sup> CLEAN-UP of Methamphetamines Act, H.R. 3782, 107th Cong. (2002); S. 2763, 107th Cong. (2002); H.R. 834, 108th Cong. (2003).

<sup>180</sup> H.R. 834 § 305(a). This provision would be added as a subsection of the existing crack house law (21 U.S.C. § 856). *Id.*

<sup>181</sup> See H.R. 3782; S. 2763; H.R. 834.

#### D. *The Ecstasy Awareness Act*

Like the CLEAN-UP of Methamphetamines Act, the Ecstasy Awareness Act<sup>182</sup> directly targets promoters for the drug use of attendees. However, this bill—introduced for the first time in July of 2003<sup>183</sup>—is even more discriminatory in that it specifically targets the electronic music community for selective treatment, and is even more draconian in its sentencing provision:

Whoever profits monetarily from a rave or similar electronic dance event, knowing or having reason to know that the unlawful use or distribution of a controlled substance occurs at the rave or similar event, shall be fined not more than \$500,000 or imprisoned not more than 20 years, or both. If the defendant is an organization, the fine imposable for the offense is not more than \$2,000,000.<sup>184</sup>

Again, the only operative element of this Act is that the owner has actual or constructive knowledge of drug use at an event. The price of this knowledge is a sentence of up to twenty years in jail and fines up to two million dollars. Perhaps surprisingly, this bill has yet to receive widespread recognition or opposition, although public concerns addressed to the RAVE Act may often be intentionally or mistakenly referencing this bill by association.<sup>185</sup>

#### E. *A Comparison of Bills Expanding Responsibility for Drug Activity*

The key distinction between these bills is the degree to which they depart from the traditional notion of liability for direct involvement in drug activity. By comparison to existing laws, the IDAPA made only a small expansion in liability, by broadening its scope from on-going operations to include one-time events.<sup>186</sup> But because of the way the crack house law has been interpreted by the courts, it may actually create liability for landowners who merely know that drug activity is taking place.<sup>187</sup> To this extent, it is a more substantial step away from direct liability. However, the CLEAN-UP of Methamphetamines Act and the Ecstasy

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<sup>182</sup> Ecstasy Awareness Act of 2003, H.R. 2962, 108th Cong. (2003).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* § 2. Like the CLEAN-UP of Methamphetamines Act and the IDAPA, this Act would add a new subsection to the existing crack house law (21 U.S.C. § 856). *Id.*

<sup>185</sup> See *supra* note 178. Senator Biden, the author and sponsor of the RAVE Act and of its successor, the IDAPA, has argued as much. See, e.g., 149 CONG. REC. S10,607 (daily ed. July 31, 2003) (statement of Sen. Biden); 149 CONG. REC. S5153 (daily ed. Apr. 10, 2003) (statement of Sen. Biden).

<sup>186</sup> See *supra* note 168 and accompanying text.

<sup>187</sup> See *supra* note 18 and accompanying text.

Awareness Act both move significantly farther away from the notion of direct liability, by holding owners and promoters liable when they *should* have known that drug use was occurring. Finally, the Ecstasy Prevention Act takes the greatest leap away from direct liability. By seeking to ban raves as a measure to combat drug use, it holds the entire rave subculture responsible for the illegal activity of individuals.

The other significant way in which these bills differ is in terms of their scope: what kinds of buildings or events come within their reach? The Ecstasy Prevention Act and the Ecstasy Awareness Act are both addressed exclusively to raves. The CLEAN-UP of Methamphetamines Act expands on this slightly to cover any entertainment event. And the IDAPA (and the pre-existing crack house law) are written neutrally, to apply to “any place” in which the prohibited activity happens to occur.

While proponents of these bills will often correctly distinguish them from one another in these respects,<sup>188</sup> they share several characteristics that have unified them in the minds of many opponents.<sup>189</sup> The first and most important aspect of these four bills is that they disclose a new strategy in addressing the problem of club drugs.<sup>190</sup> Rather than using the traditional method of directly prohibiting the use or sale of drugs, all of these bills—to differing degrees—seek to hold raves or their owners and promoters responsible for the role they play in *facilitating* the use of drugs. While the Ecstasy Prevention Act does this by encouraging local communities to simply outlaw raves,<sup>191</sup> the other three Acts would hold promoters and owners of raves and nightclubs personally liable for permitting or encouraging drug use at their events.<sup>192</sup>

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<sup>188</sup> See, e.g., 149 Cong. Rec. S10,607 (daily ed. July 31, 2003) (statement of Sen. Biden) (contrasting the scienter requirements of the IDAPA with the CLEAN-UP of Methamphetamines Act).

<sup>189</sup> See, e.g., ELECTRONIC MUSIC DEFENSE & EDUCATION FUND, LAWS, LEGISLATION, LEGAL CASES, at [http://www.emdef.org/laws\\_and\\_cases.html](http://www.emdef.org/laws_and_cases.html) (last visited Feb. 25, 2005) (discussing the four Acts together in the context of legislation affecting the electronic music community).

<sup>190</sup> See, e.g., 21 U.S.C. § 841 (2000) (creating direct liability for selling controlled substances). Although the version of the crack house law pre-dating the IDAPA had been applied to several owners and promoters of raves and nightclubs, this was only a very recent phenomenon. See *supra* Part III.B. Furthermore, the changes made to this statute under the IDAPA were purportedly intended to address some possible shortcomings of applying the statute in this new context. See 149 CONG. REC. S1679 (daily ed. Jan. 28, 2003) (statement of Sen. Biden) (noting that application of the original crack house law in the context of rave promoters and owners had met with “mixed results,” and that the RAVE Act was intended to make this law more applicable to the rave environment).

<sup>191</sup> See *supra* notes 149–53 and accompanying text.

<sup>192</sup> While Senator Biden has been at pains to point out the different standard of liability imposed by the IDAPA as compared to the CLEAN-UP of Methamphetamines Act and the

In addition to this, these three promoter-liability bills also impose significantly harsh penalties, both in terms of prison sentences and fines. A person guilty of violating the Ecstasy Awareness Act or the IDAPA could be imprisoned for up to twenty years,<sup>193</sup> and up to nine years for violating the CLEAN-UP of Methamphetamines Act.<sup>194</sup> Guilty parties could also be subject to fines of \$500,000 for individuals and \$2 million for organizations.<sup>195</sup> Furthermore, under any of these three bills, guilty parties may be subject to forfeiture of the premises used to commit their crimes,<sup>196</sup> which can mean millions of dollars in the context of nightclubs and entertainment complexes.<sup>197</sup>

Finally, none of these promoter liability proposals contain any kind of safe harbor provision allowing businesses to conduct legitimate activities without fear of prosecution.<sup>198</sup> For each of these three Acts, liability is not usually a function of people's actions, but of their minds. The only kinds of volitional acts required by these bills are those inherent to the nature of the live entertainment business: opening property to others, promoting an event, and profiting from an event.<sup>199</sup> As a result, it is not likely that these volitional requirements would usually be a significant issue when the laws are applied in the rave context. But more

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Ecstasy Awareness Act, *see, e.g.*, 149 CONG. REC. S1679 (daily ed. Jan. 28, 2003) (statement of Senator Biden); 149 CONG. REC. S10,607 (daily ed. July 31, 2003) (statement of Sen. Biden), all three Acts are trying to accomplish the same fundamental task of extending liability to promoters and owners of raves and nightclubs who are not directly selling drugs. Of course, these distinctions in the standard of liability imposed by the different Acts appear to be significant and are important to keep in mind in considering their respective merits. *See infra* Part V.B.2.

<sup>193</sup> Ecstasy Awareness Act of 2003, H.R. 2962, 108th Cong. § 2 (2003); 21 U.S.C. § 856(b) (2000).

<sup>194</sup> CLEAN-UP of Methamphetamines Act, H.R. 834, 108th Cong. § 305(a) (2003).

<sup>195</sup> 21 U.S.C. § 856(b) (2000); H.R. 2962 § 2 (2003).

<sup>196</sup> 21 U.S.C. § 853 (2000).

<sup>197</sup> *See* Pfeffer Motion to Dismiss, *supra* note 139, at 31. Indeed, in the case of Club La Vela, the defendants asserted that the forfeiture of their \$30 million, ocean-side entertainment complex was the primary motivation for their prosecution. *Id.* at 23. Apparently, 80% of these seized assets would go to local law enforcement (which was responsible for the seizure and arrests), 15% to the federal government, and 5% to charities. ELECTRONIC MUSIC DEFENSE & EDUCATION FUND, LAWS, LEGISLATION, LEGAL CASES, at [http://www.emdef.org/laws\\_and\\_cases.html#floridalavela](http://www.emdef.org/laws_and_cases.html#floridalavela) (last visited Feb. 25, 2005).

<sup>198</sup> *See Hearings: RAVE Act, supra* note 19, at 23 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU).

<sup>199</sup> IDAPA, S. 226, 108th Cong. § 2(a)(1) (2003) ("open, lease, rent, use, or maintain any place"); *id.* § 2(a)(2) ("manage or control any place . . . and . . . rent, lease, profit from, or make available for use"); CLEAN-UP of Methamphetamines Act, S. 2763 § 305(a) ("promotes any . . . entertainment event"); H.R. 2962 § 2 ("profits monetarily from a rave or similar electronic dance event").

importantly, the Acts do not allow any *avoidance* of liability for actions taken to *prevent* drug use.<sup>200</sup> Instead, the focus rests almost entirely on a person's state of mind—what he or she knew, should have known, or intended to occur. Because this state of mind must be proved by inference from volitional acts,<sup>201</sup> it is a much more uncertain standard than that of an objective, volitional act requirement. This means that promoters and owners can never be certain that—despite whatever level of precautions they have taken to prevent or minimize drug use—some of their actions will not ultimately be interpreted as showing an improper motive or knowledge and used against them in civil or criminal proceedings.<sup>202</sup>

It is this combination of uncertain liability in the face of severe punishment that has led to much concern and criticism by the public and political organizations.<sup>203</sup> So far, most of this discussion has focused on the RAVE Act.<sup>204</sup> But these laws and enforcement strategies are rapidly becoming significant issues

<sup>200</sup> Cf. N.Y. PENAL LAW § 230.40 (Consol. 2004) (“A person is guilty of permitting prostitution when, having possession or control of premises which he knows are being used for prostitution purposes, he *fails to make reasonable effort to halt or abate such use.*”) (emphasis added).

<sup>201</sup> See, e.g., *United States v. Banks*, 987 F.2d 463, 466–67 (7th Cir. 1993) (inferring that the defendant maintained a house “for the purpose” of narcotics crimes in violation of the crack house law, because he charged people a “cover charge” to smoke crack, and helped cook cocaine into crack); *United States v. Clavis*, 956 F.2d 1079, 1091–92 (11th Cir. 1992) (inferring that the defendants knowingly maintained a residence for a prohibited purpose under the crack house law by, inter alia, transporting packages to and from the location, possessing firearms in the location, and traveling “back and forth all day long” from the location).

<sup>202</sup> See *Hearings: RAVE Act*, *supra* note 19, at 23 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU). Quite to the contrary, the mere fact that owners and promoters have taken precautions to prevent drug use or minimize the harms associated with drug use has been used *against* them, as evidence of their knowledge of drug use and intent to facilitate its use. E.g., Brunet Motion to Dismiss, *supra* note 128, at 8–9; Pfeffer Motion to Dismiss, *supra* note 139, at 8–9.

<sup>203</sup> See, e.g., Press Release, Drug Policy Alliance, Opposition to Dangerous Senate RAVE Act Grows (Aug. 1, 2002), available at [http://www.drugpolicy.org/news/pressroom/pressrelease/pr\\_july18b\\_02.cfm](http://www.drugpolicy.org/news/pressroom/pressrelease/pr_july18b_02.cfm) (last visited Feb. 25, 2005).

<sup>204</sup> Despite being enacted as the IDAPA, the law's former, more memorable label seems to have stuck in the press. See, e.g., Sasha Johnson, “Punkvoter” Founder Aims to Unify Youth Vote, CNN, Nov. 4, 2003, at <http://www.cnn.com/2003/ALLPOLITICS/11/03/elec04.punkvoter/index.html> (last visited Feb. 25, 2005); Donald G. McNeil Jr., *Report of Ecstasy Drug's Great Risks is Retracted*, N.Y. TIMES, Sept. 6, 2003, at A8; Tricia Romano, *A Little Night Music*, VILLAGE VOICE, Jan. 6, 2004, at 19.



in a broader public debate on our nation's drug policies and the implications of a shift toward greater liability for owners and promoters of entertainment events.<sup>205</sup>

## V. FRAMEWORK FOR DEBATES ON OWNER AND PROMOTER LIABILITY IN CLUB DRUG INITIATIVES

Unfortunately, the lines of communication in this debate have become crossed at times, with critics sometimes failing to distinguish between the different Acts,<sup>206</sup> and with legislators and law enforcement officials consequently overlooking the legitimate concerns of those critics.<sup>207</sup> There appear to be at least three aspects of this miscommunication which negatively impact the ability of interested parties to engage in a fruitful discussion of the validity, efficacy, and desirability of owner and promoter liability in club drug initiatives: (1) misunderstanding of the legitimate goals and concerns of pursuing this strategy, (2) misconception of the meaning and values of the rave subculture, and (3) misidentification of the legitimate concerns of critics of this strategy.

First, detractors of this strategy, who may feel that it unfairly targets or chills certain forms of speech, have sometimes jumped to the conclusion that its proponents are acting on invidious or discriminatory motivations—possibly overlooking the legitimate goals and concerns that may also be behind this strategy.<sup>208</sup> And just as the courts will not impute a wrongful intent to Congress when interpreting a statute,<sup>209</sup> critics should refrain from making such accusations in a policy debate. The undesirable effect of doing so is to overlook the proponents' underlying assumptions and goals—issues on which they are presumably more receptive than an attack to their integrity.

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<sup>205</sup> See, e.g., Eric Pape et al., *The Dutch Go to Pot*, NEWSWEEK, Sept. 15, 2003, at 28 (contrasting the use of the RAVE Act in the United States with a growing legalization movement in Europe and Canada); Geov Parrish, *Rave On*, SEATTLE WEEKLY, Oct. 29, 2003, at 40 (describing the RAVE Act as "a tacit admission of the drug war's failure. . . it's an admission that people determined to use illicit substances are not being deterred by the existing draconian laws").

<sup>206</sup> See 149 CONG. REC. S5153 (daily ed. Apr. 10, 2003) (statement of Sen. Biden) (noting that critics had confused the IDAPA with the CLEAN-UP of Methamphetamines Act).

<sup>207</sup> See *id.* (statement of Sen. Biden) (acknowledging confusion between the bills, but offering only a conclusory explanation that the concerns of critics were unfounded).

<sup>208</sup> See, e.g., 149 CONG. REC. S1678 (daily ed. Jan. 28, 2003) (statement of Sen. Biden) ("The reason that I introduced this bill was not to ban dancing, kill the 'rave scene' or silence electronic music, all things of which I have been accused.").

<sup>209</sup> See, e.g., *United States v. X-Citement Video Inc.*, 513 U.S. 64, 73 (1994) ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court.").

Second, in their search for a solution to a legitimate problem of drug abuse, proponents of more expansive liability for owners and promoters have often overlooked or marginalized the unique moral, cultural, and artistic values of the rave subculture that will likely be affected.<sup>210</sup> A number of statements by both law enforcement and legislators have tended to reduce raves to little more than a vehicle for drug activity. For example, a DEA report on drug control strategies defined a rave as “a party designed to enhance a hallucinogenic experience through music and behavior.”<sup>211</sup> Similarly, the U.S. Attorney in charge of prosecuting the State Palace Theater case said “raves by definition are parties where pulsating techno music, steam, and paraphernalia such as pacifiers, chemical light sticks and flashing light rings are used to support highs from club drugs like Ecstasy.”<sup>212</sup> These kinds of over-simplistic statements overlook the many socially beneficial (and legal) aspects of the rave subculture.<sup>213</sup> Furthermore, because the concept of owner and promoter liability has focused on the rave scene, as opposed to other venues where drug use is common, statements like these undoubtedly feed into the perception that persons are being targeted for their music, rather than their criminal conduct.<sup>214</sup>

Finally, this kind of miscommunication in a public debate may ultimately cloud many of the serious issues. For example, when Senator Biden re-introduced the RAVE Act in 2003, he responded to criticisms that the Act unfairly targeted

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<sup>210</sup> See *supra* notes 49–52 and accompanying text. Chicago’s mayor, Richard Daley has gone one step farther, making an aggressive and panicked accusation against rave promoters, declaring that “[t]hey are after all of our children.” Jacob Sullum, *Sex, Drugs, and Techno Music: Why the Rap Against Ecstasy Has a Familiar Ring to It*, Jan. 2002, at <http://www.reason.com/0201/fe.js.sex.shtml> (last visited Feb. 25, 2005).

<sup>211</sup> DRUG CONTROL: DEA’S STRATEGIES, *supra* note 76, at 126 n.8. The DEA has been somewhat consistent in its narrow view of raves. In a DEA promotional video on club drugs, agent David Gavin stated:

Lately raves are just a venue for drug purchases. They are no more than analogous to a crack house, in which you go buy the drugs and go out the back door. Although there’s music being played, and the people at the raves are saying, “I come here for the music,” drugs are predominant in these rave clubs. And it’s just a mix of drugs and music, and it’s become a venue for drug purchases.

DEA Video, *supra* note 39. The DEA has also referred to raves as “glorified drug parties.” Leinwand, *supra* note 27.

<sup>212</sup> Brett Martel, *Indictment Could Bolster Investigations of Raves Nationwide*, TIMES-PICAYUNE, Jan. 13, 2001, at B1, available at [http://www.harmreduction.org/issues/hmnews/rave\\_support.html#nationwide](http://www.harmreduction.org/issues/hmnews/rave_support.html#nationwide) (last visited Feb. 25, 2005).

<sup>213</sup> See Brunet Motion to Dismiss, *supra* note 128, at 10–13 (describing the pervasive impact of electronic music on mainstream culture).

<sup>214</sup> Cf. *id.* at 16–18 (arguing that holding rave promoters liable ignores the prevalence of drug use in many other comparable settings).

raves (as opposed to other music events) by removing the "Findings" section<sup>215</sup> and changing the title to the Illicit Drug Anti-Proliferation Act.<sup>216</sup> But the operative portions of the bill remained the same, despite having come under heavy criticism. Several important arguments made at congressional hearings on the RAVE Act, which went directly to the scope of liability created by the operative portions of the Act and which could have been easily addressed by minor drafting changes, were completely ignored.<sup>217</sup>

In particular, one of the most surprising and contentious issues in these hearings was whether the "for the purpose" language in 21 U.S.C. § 856(a)(2) applies to the accused person, or to the person who is admitted on to the accused's property.<sup>218</sup> For over thirteen years, courts have consistently ruled that this wrongful "purpose" requirement does *not* apply to the accused,<sup>219</sup> and critics have argued that this interpretation essentially holds owners liable for the purposeful actions of *others*.<sup>220</sup> Even Senator Biden, as the author of the original crack house law, has argued on the Senate floor against the courts' interpretation.<sup>221</sup> But when it came time to revise the statute, he did not even try to clarify his intention by including what would have been a minor drafting alteration.<sup>222</sup> Thus, to some degree, addressing this controversial, substantive aspect of owner and promoter liability was passed over in favor of making the statute simply *appear* less discriminatory.<sup>223</sup>

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<sup>215</sup> RAVE Act, S. 2633, 107th Cong. § 2 (2003). These "findings" focused the Act squarely on the rave setting by documenting the relationship of ecstasy and raves, as well as the kind of evidence believed to show a promoter's or owner's attempt to encourage or profit off drug use. This evidence included selling bottled water, glow sticks, and massage oils, as well as hiring off-duty police officers to patrol the venue. *Id.*

<sup>216</sup> 149 CONG. REC. S1678 (daily ed. Jan. 28, 2003) (statement of Senator Biden).

<sup>217</sup> See *Hearings: RAVE Act*, *supra* note 19, at 24–25 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU).

<sup>218</sup> See *id.* at 55–58 (discussion of the mental element in 21 U.S.C. § 856); see also *supra* note 119–20 and accompanying text.

<sup>219</sup> *United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990); *United States v. Tamez*, 941 F.2d 770, 774 (9th Cir. 1991); *United States v. Banks*, 987 F.2d 463, 466 (7th Cir. 1993).

<sup>220</sup> See, e.g., *Hearings: RAVE Act*, *supra* note 19, at 55–58 (discussion of the mental element in 21 U.S.C. § 856).

<sup>221</sup> See 149 CONG. REC. S10,607 (daily ed. July 31, 2003).

<sup>222</sup> This could potentially have been accomplished as simply as changing "for the purpose [of engaging in drug activity]" to "with the purpose [of engaging in drug activity]." See 21 U.S.C. § 856(a)(2) (2000).

<sup>223</sup> This fact seems all the more inexplicable in light of the manner in which the IDAPA was passed. As a rider on the PROTECT Act, the Act faced little chance of opposition in whatever form it took. See *supra* notes 160–65 and accompanying text.

It is situations like this that underscore the need for all sides in this ongoing debate to have a well-founded understanding of each other's positions. The following framework seeks to organize and discuss some of the more important aspects of the various positions in an attempt to help all sides understand each other more thoroughly, and thereby encourage more fruitful discussion.<sup>224</sup>

### *A. Positions Supporting More Expansive Owner and Promoter Liability*

While the DEA and several members of Congress have clearly advocated their support for more expansive liability of owners and promoters as a means of addressing club drug abuse, there are also some business<sup>225</sup> and drug-awareness<sup>226</sup> organizations taking this side on the debate. Uniting these groups are two particular issues: concern for the harmful effects of drug use on society, and frustration over the inability to effectively counter these effects.

#### *1. Concern*

First and foremost, these persons are genuinely concerned about the growing abuse of club drugs. In a number of congressional hearings, voluminous testimony recounted the harmful effects of ecstasy and other drugs, both through trafficking operations<sup>227</sup> and from actual drug use.<sup>228</sup> Furthermore, evidence presented at these hearings shows that use of ecstasy is growing—spreading to new geographic areas and to new groups of users.<sup>229</sup>

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<sup>224</sup> In light of the goals of this Note, it is not appropriate to give an exhaustive analysis of each of the issues raised, or to come to a conclusive position on them. In the debate on owner and promoter liability, it is up to each party to decide which issues are most central or persuasive as to their particular interests. As such, this framework is intended to provide a useful medium in which future discussions can take place.

<sup>225</sup> See, e.g., 149 CONG. REC. S1679 (daily ed. Jan. 28, 2003) (published statement of the Coalition of Licensed Beverage Association, supporting the RAVE Act).

<sup>226</sup> See, e.g., *Hearings: RAVE Act*, *supra* note 19, at 15 (testimony of Judy Kreamer, President, Educating Voices, Inc.).

<sup>227</sup> See, e.g., *Hearings: America at Risk*, *supra* note 59 (statement of Jim McDonough, Dir., Fla. Office of Drug Control) (“[T]here is nothing ‘benign’ about the illegal trade in Ecstasy and other club drugs. It is dangerous and potentially violent . . .”); *id.* (statement of Steven Rust, Sergeant, Milford, Del. Police Dep’t) (“Today, a new generation of illegal drugs threatens our communities. It is bringing with it the burglaries, thefts, robberies and violence as seen with crack.”).

<sup>228</sup> See, e.g., *Hearings: Underestimating the Threat*, *supra* note 46 (statement of Donald R. Vereen, Jr., Deputy Dir., Office of Nat’l Drug Control Policy) (discussing the various adverse health effects of ecstasy use); *Hearings: America at Risk*, *supra* note 59 (statement of Dr. Bill Jacobs, Medical Dir., Gateway Cmty. Servs.) (same).

<sup>229</sup> See *supra* notes 98–103 and accompanying text.

But in particular, much of this concern focuses on the fact that the adverse effects of club drug abuse fall disproportionately on the *youth* of the nation. Evidence at congressional hearings reflected the fact that club drugs are primarily abused by young adults, from eighteen to twenty-five years old,<sup>230</sup> and included several first-hand accounts by young victims of ecstasy use.<sup>231</sup> This concern was manifested in several "findings" in the RAVE Act concerning the abuse of drugs by "young people" and "young adults."<sup>232</sup> Likewise, when discussing bills such as the IDAPA, the CLEAN-UP of Methamphetamines Act, and the Ecstasy Prevention Act, proponents continually emphasize the importance of these Acts to prevent the further spread of drugs to our children.<sup>233</sup>

Most importantly, there is widespread concern over the role that raves may play as a forum in exposing or introducing these young persons to drugs. Numerous studies have confirmed the anecdotal knowledge that drug use is present at raves and nightclubs,<sup>234</sup> and law enforcement and legislators are concerned that drug use may not be simply *occurring* in raves, but may actually be *permitted* or *encouraged* by some owners and promoters.<sup>235</sup> As evidence of this, they have referred to promoters directly selling drugs, getting kickbacks from drug sales, telling security guards to ignore drug violations, or using rave advertisements containing words and symbols with drug connotations.<sup>236</sup> Given these legitimate concerns over youth drug use, it seems a relatively natural response to extend some level of culpability to those encouraging drug use at raves.<sup>237</sup>

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<sup>230</sup> See, e.g., *Hearings: Underestimating the Threat*, *supra* note 46 (statement of Dr. Donald R. Vereen, Jr., Deputy Dir., Office of Nat'l Drug Control Policy).

<sup>231</sup> *Id.* (statement of Amy Ross, sister of ecstasy victim); *Hearings: America at Risk*, *supra* note 59 (statement of Vinnie and Michelle, clients, Daytop Suffolk Outreach and Daytop Village).

<sup>232</sup> RAVE Act, S. 2633, 107th Cong. §§ 2(1), 2(4), 2(5), 2(8) (2002).

<sup>233</sup> See, e.g., 149 CONG. REC. S10,606 (daily ed. July 31, 2003) (statement of Sen. Biden) ("[IDAPA] is only trying to deter illicit drug use and protect kids."); 149 CONG. REC. E246 (2003) (Statement of Rep. Ose) (noting that the CLEAN-UP of Methamphetamines Act will help prosecute promoters of raves, where children are often first exposed to drugs); 147 CONG. REC. S7967 (2001) (statement of Sen. Graham) (noting that the Ecstasy Prevention Act "focus[es] on the serious danger it presents to our youth").

<sup>234</sup> See, e.g., PULSE CHECK, *supra* note 68, at 81.

<sup>235</sup> See, e.g., 149 CONG. REC. S5153 (daily ed. Apr. 10, 2003) (statement of Sen. Biden); 149 CONG. REC. E247 (daily ed. Feb. 13, 2003) (statement of Rep. Ose); *Hearings: Looking the Other Way*, *supra* note 11 (statement of Asa Hutchinson, Adm'r, Drug Enforcement Admin.).

<sup>236</sup> See, e.g., 149 CONG. REC. S5153 (daily ed. Apr. 10, 2003) (statement of Sen. Biden).

<sup>237</sup> Cf. *Hearing Before the House Gov't Reform Subcomm. on Criminal Justice, Drug Policy, and Human Res.*, 108th Cong. (2002) (statement of Asa Hutchinson, Adm'r, Drug

## 2. Frustration

In light of these significant concerns and the attempts made to address them, the fact that the use of club drugs has not been significantly curtailed has caused frustration in several respects.<sup>238</sup> First, traditional methods for reducing drug activity have been somewhat less effective as applied to club drugs—ecstasy in particular. In addition to users and sellers being notably young, thereby making penetration of drug organizations more difficult,<sup>239</sup> production and trafficking of ecstasy has followed some unusual patterns.<sup>240</sup> As a synthetic drug, ecstasy can be produced in large amounts in relatively small labs, making detection of manufacturers more difficult.<sup>241</sup> And because ecstasy is transported in pill form, it can be shipped in small packages—either through delivery services or by individual couriers—that are more easily concealed than the kilogram-sized packages required for drugs like cocaine, heroin, and marijuana.<sup>242</sup> Given these difficulties in reducing the supply of ecstasy, promoters and owners that encourage drug use at their events are a comparatively attractive target. But because existing drug laws are designed to target persons *directly* involved in the manufacturing or trafficking of drugs, they are difficult to extend to those persons who are merely *complicit* in drug trafficking but not directly involved.

Another cause for frustration is the continuing debate over the health effects of ecstasy. Despite the extensive drug-awareness campaign aimed at ecstasy and

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Enforcement Admin.), available at <http://www.usdoj.gov/dea/pubs/cngrtest/ct091902p.html> (last visited Feb. 25, 2005) (noting that after the State Palace Theater management entered its plea agreement, “club drug related overdoses in New Orleans have dropped 90%, with ecstasy overdoses disappearing altogether”); INFORMATION BULLETIN: RAVES, *supra* note 50, at 5 (same).

<sup>238</sup> See Dave Kopel & Glenn Reynolds, *Feel Like Dancing? Beware of Tom Daschle*, NAT’L REV. ONLINE, Jan. 30, 2003, available at <http://www.nationalreview.com/kopel/kopel013003.asp> (last visited Feb. 25, 2005). For example, despite the rise in DEA arrests for ecstasy from 443 in 1999 to 1,792 in 2001, 1.6 million people tried ecstasy for the first time in 2001–2002. See *Hearings: RAVE Act*, *supra* note 19, at 9, 10 (prepared statement of Asa Hutchinson, Adm’r, Drug Enforcement Admin.) (“In 2001, 8.1 million Americans aged 12 and older had used ecstasy, up from 6.5 million in 2000.”).

<sup>239</sup> See *supra* notes 105–07 and accompanying text.

<sup>240</sup> 147 CONG. REC. S7966 (daily ed. July 19, 2001) (statement of Sen. Graham) (“[E]cstasy has erased all of the old routes law enforcement has mapped out for the smuggling of traditional drugs.”).

<sup>241</sup> See *Hearings: Underestimating the Threat*, *supra* note 46 (statement of Rand Beers, Assistant Sec’y of State, Int’l Narcotics and Law Enforcement Affairs, Dep’t of State).

<sup>242</sup> See *id.* (statement of Richard A. Fiano, Chief of Operations, Drug Enforcement Admin.); *id.* (statement of Raymond W. Kelly, Comm’r, U.S. Customs) (“The drug’s compact size makes smuggling options almost infinite.”).

other club drugs,<sup>243</sup> there is still uncertainty in public and scientific opinion as to exactly *how* harmful ecstasy use is.<sup>244</sup> Public opinion as to the general safety of ecstasy use seems to be largely driven by the common sense observation that despite the millions of ecstasy users worldwide, few users have died.<sup>245</sup> In scientific opinion, the dangers of hyperthermia and cardiac arrhythmias are relatively well-accepted consequences of ecstasy use,<sup>246</sup> but the debate over the long-term neurological effects has been hotly contested, with some studies showing no long-term effects at all and others showing severe short and long-term effects.<sup>247</sup> This inability to substantially alter the public perception of ecstasy use undercuts the government's ability to deter the public's desire to use it, and suggests that new procedures to reduce its abuse are required.<sup>248</sup>

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<sup>243</sup> See, e.g., *Hearings: RAVE Act*, *supra* note 19, at 11 (prepared statement of Asa Hutchinson, Adm'r, Drug Enforcement Admin.) (describing the elements of "The Ecstasy and Predatory Drug Awareness Campaign"); see also Children's Health Act of 2000, Pub. L. No. 106-310, § 3665, 114 Stat. 1101, 1244 (2000) (providing funds for "Ecstasy and Other Club Drugs Abuse Prevention" efforts); PROTECT Act, Pub. L. No. 108-21, § 608(g), 117 Stat. 650, 692 (2003) (authorizing appropriations for education about club drugs).

<sup>244</sup> See, e.g., McNeil, *supra* note 61.

<sup>245</sup> See, e.g., *id.* ("According to an annual federal survey, almost 10 million Americans have tried Ecstasy. Few have died."); *Press the Panic Button*, NEW SCIENTIST, Jan. 25, 1997, at 3.

In Britain, it is estimated that at least half a million people have taken ecstasy and that around a million tablets are consumed each week. . . .

Over the past ten years, six people a year are thought to have died as a result of taking ecstasy in Britain. . . . Even pursuits such as mountain climbing, skiing and horse riding kill more people.

*Id.*

<sup>246</sup> See, e.g., Judith Lewis, *Your Brain on Bad Science*, L.A. WEEKLY, Sept. 12, 2003, at 20 (reporting that critics of long-term memory studies on ecstasy use note these dangers as more certain and in need of greater study).

<sup>247</sup> See, e.g., *id.* (discussing scientific debate over differing results of long-term neurological studies); McNeil, *supra* note 61 (same). The debate has taken a particularly embarrassing turn for the government after the premier study showing long-term neurological damage from ecstasy use was retracted because four of the five primates in the experiment were injected with methamphetamine rather than ecstasy. George A. Ricaurte et al., *Retraction*, 301 SCIENCE 1479 (2003); see also McNeil, *supra* note 61; Smith, *supra* note 40. This study was heavily relied upon for the government's "This is your brain on ecstasy" campaign, and was "widely quoted when Congress was lining up support for the Illicit Drug Anti-Proliferation Act." *Id.*; c.f. 148 CONG. REC. S9699 (daily ed. Oct. 1, 2002) (statement of Sen. Graham) (reprinting in the Congressional Record an article citing the results of Ricaurte's study, as evidence in support of the need for the Ecstasy Prevention Act).

<sup>248</sup> See Gomez, *supra* note 12 ("The real story is that federal law enforcement efforts against ecstasy have proved impotent . . . Frustrated by this failure, they've targeted electronic

In sum, the situation confronting law enforcement is a growing abuse of drugs that are widely believed to be dangerous in some respects, a particularly young age of users, a diminished capacity to reduce supply (by counteracting the drugs' trafficking and manufacturing) and demand (by altering public perception of the drug's safety) and the fact that at least *some* rave promoters and owners have played a role facilitating the use and sale of drugs. While these persons may not always be directly involved in drug sales,<sup>249</sup> they are providing a forum in which it is likely that drug sales will occur. To some, this suggests that at least a *partial* solution is to extend greater liability to these persons. Any meaningful discussion of this argument must necessarily take these specific concerns and frustrations into account.

### *B. Positions Opposing Expansive Owner and Promoter Liability*

As reasonable as the above position may appear, most critics argue that the problem is not with its goals, but with the means used to pursue them.<sup>250</sup> Arguments against expanding liability to owners and promoters of events as a means of addressing drug abuse can generally be grouped into three categories.<sup>251</sup> First, there are arguments that this policy will not be effective at reducing drug abuse or its harmful consequences. Second, the bills as drafted may be too vague to allow business owners and promoters to know how they may conduct a

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music concerts, raves, not because they're especially important targets, they're not, but because they're easy and public targets.") (quoting Glenn Harlan Reynolds of FOX News); Jacob Sullum, *Party Poopers*, REASONONLINE, July 24, 2002, *at* <http://reason.com/links/links072402.shtml> (last visited Feb. 25, 2005) ("Stung by critics who say Ecstasy and other 'club drugs' are not as dangerous as they've made them out to be, politicians seem determined to remedy the situation."); *cf.* Brunet Motion to Dismiss, *supra* note 128, at 14–15 ("The DEA has both succumbed to the media hype and furthered the panic over ecstasy . . . [F]eeling pressure from the media and the public, the DEA is targeting electronic music concert promoters throughout the country, instead of going after those who are actually involved with drugs.").

<sup>249</sup> There have been instances where rave promoters were found to be directly involved in distributing drugs at raves. *See, e.g.,* Leinwand, *supra* note 27 (describing a Boise, Idaho rave promoter who hired security to keep drugs out so that his own dealers could deal exclusively).

<sup>250</sup> *See, e.g., Hearings: RAVE Act, supra* note 19, at 18 (statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU) ("I think there is a recognition here that there are some Rave promoters who are drug dealers. . . . [They have been] charged under the drug conspiracy laws, because when you deal drugs, of course you are guilty of that crime. We don't need this act to get those people.").

<sup>251</sup> While some of these aspects are presented as issues of public policy, others are couched in legal terms. However, these legal arguments are not meant to be a conclusive discussion of the validity of any of these bills, but rather a more familiar and effective manner of organizing and presenting particular concerns.



legitimate event without exposing themselves to possible liability. And finally, certain forms of speech, including music, dance, and political speech, may be chilled because they will lack a forum for expression.

### 1. *Efficacy*

Some critics have argued that expanding liability to owners and promoters of raves and nightclubs is simply not an *effective* manner of addressing the concerns and frustrations regarding club drugs.<sup>252</sup> First, it is unclear what percentage of drug use or sales occur at raves or nightclubs, or what percentage of this would be eliminated—or merely displaced—by making raves and nightclubs an inopportune venue for drug activity.<sup>253</sup> As was often noted in congressional hearings, the use of club drugs is no longer confined to the rave and nightclub scene, but has expanded into mainstream culture,<sup>254</sup> and trafficking has grown to include a number of other venues.<sup>255</sup> Thus, even if some measures could ensure that raves and nightclubs would be totally drug-free, those measures might be ineffective at reducing overall drug use.

Critics have also argued that measures expanding liability for promoters and owners will simply move drug use to other venues where the physical harms from drug use may be greater.<sup>256</sup> If licensed raves become more difficult to host, they

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<sup>252</sup> See, e.g., Philip Jenkins, *Ecstasy and Synthetic Panics*, J. COGNITIVE LIBERTIES, Fall 2000, at 7, 27–28, available at <http://www.cognitiveliberty.org/3jcl/3JCL7.htm> (last visited Feb 25, 2005) ("Legislators are naturally and commendably concerned about the need to protect young people . . . . But the danger is that in trying to offer better safeguards for youth, they will enact new prohibitions and criminal justice-oriented policies which will result in causing more harm, more injury and death.").

<sup>253</sup> See Brunet Motion to Dismiss, *supra* note 128, at 16–18.

<sup>254</sup> See *supra* notes 98–102 and accompanying text. Even before this cultural and geographic expansion of drug use, it was not certain that raves were the exclusive venue for club drug use to the extent that they were portrayed as such. See Alasdair J.M. Forsyth, *Places and Patterns of Drug Use in the Scottish Dance Scene*, 91 ADDICTION 511, 515 tbl. 2 (1996) (Abindgon, England) (describing a 1996 study of drug use in Scotland, which showed only 3.3% of ecstasy use occurred at "licensed" raves, while 59% occurred in traditional nightclubs, and 30.3% occurred in private homes).

<sup>255</sup> See PULSE CHECK, *supra* note 68, at 81 exhibit 8. Of the twenty-one cities included in this 2001 study of drug use in the United States, twenty reported sales of club drugs at raves and concerts, eighteen at nightclubs and bars, eighteen at college campuses, seventeen at private residences, and fourteen at private parties. *Id.* While this is not meant to say that eliminating raves and nightclubs as a venue for drug sales would not help reduce drug trafficking to some degree, it does raise the possibility that trafficking will simply shift to these other venues.

<sup>256</sup> See *Hearings: RAVE Act*, *supra* note 19, at 24 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU); Brunet Motion to Dismiss, *supra* note 128, at 19; cf. Weir, *supra* note 49, at 1847 (noting that measures in Great Britain attempting to ban raves as a

may simply be driven back underground to the abandoned warehouses and fields where they began.<sup>257</sup> This in turn may lead to increased harm from drug use, because these venues will lack adequate security, running water, air conditioning, medical staff, transportation, and other elements that help reduce the prevalence and physical harms of drug use.<sup>258</sup>

According to this argument, the above concerns and frustrations may merit taking *some* kind of action, but expanding owner and promoter liability will simply be ineffective at achieving the desired reduction in the use of or harms caused by club drugs. In contrast, the remaining arguments contend that even if this policy of expanding owner and promoter liability would be able to achieve the desired reduction in the use of club drugs, the *costs* of doing so would outweigh the benefits.

## 2. Vagueness

A major concern of critics has been the uncertain sweep of the laws: what conduct does it criminalize, and what guidelines will allow business persons to host legitimate entertainment events without fear of prosecution?<sup>259</sup> Although this argument has strong merit simply on grounds of public policy,<sup>260</sup> a constitutional perspective is also illustrative. The basic constitutional rule of vagueness is “that

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drug control measure simply moved the drug use into nightclubs and “increased the risks involved with mixing drugs and alcohol”); Michael J. Rieder, *Some Light from the Heat: Implications of Rave Parties for Clinicians*, 162 CAN. MED. ASS’N J. 1829, 1829 (2000), available at <http://www.cmaj.ca/cgi/content/full/162/13/1829> (last visited Feb. 25, 2005) (“[B]ans may prolong the popularity of the rave scene and make rave-related problems more difficult to control . . .”).

<sup>257</sup> See *Hearings: RAVE Act*, *supra* note 19, at 24 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU); Brunet Motion to Dismiss, *supra* note 128, at 19.

<sup>258</sup> See *Hearings: RAVE Act*, *supra* note 19, at 24 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU); Brunet Motion to Dismiss, *supra* note 128, at 19; Sullum, *supra* note 248.

<sup>259</sup> See, e.g., *Hearings: RAVE Act*, *supra* note 19, at 23 (prepared statement of Graham Boyd, Dir., Drug Litig. Project, ACLU); Brunet Motion to Dismiss, *supra* note 128, at 28–30; Pfeffer Motion to Dismiss, *supra* note 139, at 25–30; see also Shadi Kardan, Comment, *The Government’s New War on Drugs: Threatening the Right to Dance!*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 99, 118–20 (2003) (discussing vagueness of the original crack house law as applied to rave promoters).

<sup>260</sup> That is, even if laws basing liability for owners and promoters on their mere knowledge of drug use would survive constitutional scrutiny, any uncertainties in the law could still affect the multi-billion dollar live entertainment industry in the United States, which is certainly a factor to be weighed in considering the desirability of this policy. See XENTEL, ANNUAL REPORT (2000), <http://www.xentel.com/xentel/2000annual/00company.htm> (last visited Feb. 25, 2005) (reporting that the United States’s live entertainment industry in 1999 generated more than \$11 billion).

an enactment is void for vagueness if its prohibitions are not clearly defined."<sup>261</sup> But within this general rule there are three components, all of which are at issue here.

First, laws must provide "fair warning," by "giv[ing] the person of ordinary intelligence a reasonable opportunity to know what is prohibited."<sup>262</sup> The premise of this idea is that if people know what a law prohibits, they will be able to avoid liability if they so desire.<sup>263</sup> For owners and promoters in the live entertainment business, this means they must be able to choose a manner of conducting a legitimate event that will not create liability. However, the circumstances surrounding the State Palace Theater and Club La Vela undermine this possibility with respect to 21 U.S.C. § 856. In both cases, the owners played no part in the sale or distribution of drugs, and took measures above and beyond normal security to prevent and punish users and sellers of drugs.<sup>264</sup> But charges were still brought, as well as a \$30 million forfeiture suit.<sup>265</sup> Furthermore, some of the measures taken to prevent drug use or minimize its harms were even used against these persons as evidence of wrongdoing.<sup>266</sup> Other business owners and promoters looking to these cases for guidance on how to conduct an entertainment event in a manner that avoids prosecution under the crack house law will find little help.

This problem is even more stark with regard to the CLEAN-UP of Methamphetamines Act and the Ecstasy Awareness Act. Whereas the crack house law has two mental elements, knowledge and purpose,<sup>267</sup> in these Acts, knowledge of drug use is the only mental element.<sup>268</sup> And furthermore, actual knowledge of drug use is not even required—these Acts are satisfied where the owner or promoter "reasonably ought to know" or has "reason to know" of drug use.<sup>269</sup> But because some drug use is present at most concerts and entertainment events, owners and promoters will always have "reason to know" that drug activity will occur at one of their events—it is simply inherent in the nature of

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<sup>261</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> See *supra* notes 127–30 and accompanying text.

<sup>265</sup> See *supra* note 140.

<sup>266</sup> These measures included calling the police to arrest drug offenders, having medical assistance on duty, and selling bottled water. See *Pfeffer Motion to Dismiss*, *supra* note 139, at 6–7; *Brunet Motion to Dismiss*, *supra* note 128, at 8–9.

<sup>267</sup> As noted, the purpose requirement in § 856(a)(2) has been effectively read out by judicial interpretation. See *supra* note 18 and accompanying text.

<sup>268</sup> See *supra* notes 180, 184 and accompanying text.

<sup>269</sup> See *supra* notes 180, 184 and accompanying text.

their occupation.<sup>270</sup> Essentially, it is the mere fact that they are allowing a crowd of persons to gather for an entertainment event that creates liability, regardless of any actions taken to prevent drug use. The result is that they have no way of knowing how they may conduct a legitimate event in a manner that will not make them liable.

The second aspect of vagueness is a concern for arbitrary and discriminatory enforcement. As such, "laws must provide explicit standards for those who apply them," and may not "delegate[ ] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis."<sup>271</sup> The CLEAN-UP of Methamphetamines Act and the Ecstasy Awareness Act appear to provide little guidance as to where and when law enforcement agencies should apply them. Their only requirements are that the event in question is an *entertainment* event of some sort, and that the owner or promoter generally has reason to know that drug use will occur.<sup>272</sup> But as just discussed, this could potentially implicate any entertainment event, regardless of the intent of the owners or promoters or any precautions they have taken. Therefore, the decision of exactly which entertainment events to investigate or prosecute is left entirely in the hands of law enforcement and prosecutors. In light of the manner in which the crack house law has been used, there is reason to suspect that this enforcement would be sought against particular kinds of music or speech, while other venues equally culpable would remain exempt.<sup>273</sup> Presumably, Congress would not intend to enact laws that create immediate and severe liability for virtually the entire entertainment industry, but these two Acts appear to do just that, by failing to provide "explicit standards" as to when and where they should be enforced.

Although the crack house law offers additional guidance to law enforcement in that it requires a second mental element, it may ultimately do little to remove the wide discretion that poses a risk of discriminatory enforcement.<sup>274</sup> Unlike the other two Acts, the crack house law applies to *any* venue or building regardless of the kind of legitimate activity taking place—it is left up to law enforcement to decide where and when enforcement will be pursued.<sup>275</sup> As interpreted and

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<sup>270</sup> Cf. Pfeffer Motion to Dismiss, *supra* note 139, at 22; Brunet Motion to Dismiss, *supra* note 128, at 26.

<sup>271</sup> Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

<sup>272</sup> See *supra* notes 180, 184 and accompanying text.

<sup>273</sup> Cf. Pfeffer Motion to Dismiss, *supra* note 139, at 22; Brunet Motion to Dismiss, *supra* note 128, at 24–26; *Hearings: RAVE Act*, *supra* note 19, at 22–23 (prepared statement of Graham Boyd, Dir., Drug Litig. Project, ACLU).

<sup>274</sup> See *Hearings: RAVE Act*, *supra* note 19, at 22–23 (prepared statement of Graham Boyd, Dir., Drug Litig. Project, ACLU).

<sup>275</sup> See *id.* The attitude of the prosecution in the State Palace Theater case seems to reflect this, by acknowledging that using the crack house law in the situation was "a reach." Apparently, they decided to bring the case under this statute, not because the promoters had

enforced by the DEA in the State Palace Theater and Club La Vela cases, this law applies to situations where drug use is present but the owners and promoters have not played any direct part in the sale or use of those drugs.<sup>276</sup> Conceivably, such an interpretation could implicate most forms of live entertainment, as well as other forums such as schools and private residences. But as evidenced by the Department of Justice's guidelines for enforcement of the crack house law, the DEA has decided that—apart from situations where owners are directly involved with the sale of drugs—this law will be selectively enforced against raves and electronic music events.<sup>277</sup> Thus, the vagueness of this law allows the DEA to first give it a broad interpretation—taking it out of the context of crack houses and direct involvement in drug activity—and to then enforce it in a specific, discriminatory manner.

The third reason that vague laws are problematic is because of their chilling effect upon lawful or protected conduct. A law that does not give citizens "fair warning" about what conduct is prohibited "operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution"<sup>278</sup> because it will "lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."<sup>279</sup> These concerns are even more pointed in cases where conduct protected by the Constitution may be chilled. "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."<sup>280</sup> As such, where a "law interferes with the right of free speech or of association, a more stringent vagueness test should apply."<sup>281</sup>

Because music is a form of protected speech under the First Amendment,<sup>282</sup> critics argue that these proposed laws and enforcement policies impermissibly

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clearly violated this law, but because it was "the only statute that seemed to fit." See Leinwand, *supra* note 27.

<sup>276</sup> See *supra* notes 127–43 and accompanying text.

<sup>277</sup> See INFORMATION BULLETIN: RAVES, *supra* note 50, at 5–6. To some extent, this is true for local law enforcement, which may assist in implementing these laws.

<sup>278</sup> *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 287 (1961).

<sup>279</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotes and citations omitted).

<sup>280</sup> *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

<sup>281</sup> *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

<sup>282</sup> *Ward v. Rock against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."). To the extent that the right to host a music event is concerned, the Ninth Circuit has held that the First Amendment's right to free speech includes the right of promoters to conduct a musical event. *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 566–69 (9th Cir. 1984).

chill protected conduct through their vagueness.<sup>283</sup> To begin, the lack of clear standards for prohibited conduct and the absence of safe harbor provisions make it difficult for business owners to know how to conduct a legitimate event in a way that will not result in prosecution or conviction.<sup>284</sup> In addition to this, all three bills carry heavy penalties—in the forms of prison, fines, and forfeiture—that await any legitimate business owners who guess incorrectly about how to conduct an event safely.<sup>285</sup> But most importantly, business owners and promoters are aware that these laws are not (or would not be, if enacted) enforced evenhandedly with respect to the *kinds* of music or speech taking place.<sup>286</sup> The result is that promoters and owners may be more reluctant to host those events that unreasonably increase their likelihood of prosecution, conviction, or forfeiture.

While there is some anecdotal evidence that this chilling effect has already begun,<sup>287</sup> an incident in Billings, Montana clearly supports this argument. On May 30, 2003, the Eagles Lodge was scheduled to host a fund-raising concert for Montana State University's chapters of the National Organization for the Reform of Marijuana Laws (NORML) and Students for a Sensible Drug Policy.<sup>288</sup> This concert came to an unexpected halt when a DEA agent approached the Eagles Lodge manager and informed her that if anyone were caught using illegal drugs at the event, the lodge would be liable for a \$250,000 fine.<sup>289</sup> The manager referred the matter to the Lodge trustees who, after conferring with their lawyers, decided

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<sup>283</sup> See, e.g., Pfeiffer Motion to Dismiss, *supra* note 139, at 11; Brunet Motion to Dismiss, *supra* note 128, at 28–30; *Hearings: RAVE Act*, *supra* note 19, at 24 (prepared statement of Graham Boyd, Dir., Drug Litig. Project, ACLU).

<sup>284</sup> Cf. Jacob Sullum, *The Chill Is On: Fighting Raves, Squelching Speech*, REASONONLINE, July 18, 2003, at <http://reason.com/sullum/071803.shtml> (last visited Feb. 25, 2005) (“For anxious venue owners, the question is not whether the government could impose a civil fine or obtain a conviction that would be upheld on appeal; the question is whether a federal agent might think it’s worth a shot.”).

<sup>285</sup> See *supra* notes 193–97 and accompanying text.

<sup>286</sup> See *Hearings: RAVE Act*, *supra* note 19, at 23–24 (prepared statement of Graham Boyd, Dir., Drug Litig. Project, ACLU).

<sup>287</sup> See, e.g., Romano, *supra* note 204; Mona Jonz, *Rave Act Protest*, Sept. 9, 2003, at [http://www.shejay.net/01\\_feat\\_articles/articles\\_raveactupdate.htm](http://www.shejay.net/01_feat_articles/articles_raveactupdate.htm) (last visited Feb. 25, 2005) (noting that since the passage of the IDAPA, there has been a decrease in activity for a DJ booking agency, and that Camel pulled its “club sponsorship program”); see also Pelisek, *supra* note 12 (noting reports of promoters who feel the RAVE Act would put rave promoters out of business).

<sup>288</sup> Steven Wishnia, *Raving Mad: New Drug Law Limits Gatherings*, IN THESE TIMES, Aug. 21, 2003, at 6, available at <http://www.inthesetimes.com/site/main/article/345/> (last visited Feb. 25, 2005).

<sup>289</sup> *Id.*

not to risk the fine and cancelled the event.<sup>290</sup> Although the DEA said that the warning was not motivated by the content of the event,<sup>291</sup> and has since issued internal guidelines on enforcing the crack house law,<sup>292</sup> the chilling effect was nonetheless accomplished. Understandably, business owners remain skeptical about the DEA's future enforcement of the crack house law.<sup>293</sup>

Any chilling effects of the CLEAN-UP of Methamphetamines Act and the Ecstasy Awareness Act would probably be even greater than those for the crack house law. First, whereas the crack house law applies broadly to any establishment, these Acts are targeted at entertainment venues.<sup>294</sup> Furthermore, these Acts only require constructive knowledge, rather than actual knowledge and intent, which means there would be even less guidance for how legitimate business owners and promoters could avoid liability for legitimate events.<sup>295</sup> As a result, owners and promoters engaging in the targeted businesses may have even more reason to abstain from hosting events than would those same persons under the crack house law.

Because these Acts raise concerns of fair warning, arbitrary and discriminatory enforcement, and the chilling of protected conduct, opponents of expanding owner and promoter liability may ultimately be able to challenge their

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<sup>290</sup> Sullum, *supra* note 284. The manager reported that the penalties threatened by the DEA "freaked me out." *Id.*

<sup>291</sup> David Crisp, *Free Drugs or Free Speech?*, BILLINGS OUTPOST, June 12, 2003, at A2, available at <http://www.billingsnews.com/story?storyid=5213&issue=152> (last visited Feb. 25, 2005). The Eagles Lodge has hosted alternative and punk concerts in the past without receiving a warning, and in this same interview, this DEA agent noted his "unapologetic" disapproval of medical marijuana laws. *Id.*

<sup>292</sup> See Joseph R. Biden, Jr., *Questions for the Record for Karen Tandy*, at [http://www.drugpolicy.org/docUploads/biden\\_qs\\_tandy.pdf](http://www.drugpolicy.org/docUploads/biden_qs_tandy.pdf) (last visited Feb. 25, 2005). These guidelines have not been made public, but have been summarized on the DEA website. See DRUG ENFORCEMENT ADMIN., FAQs ABOUT THE ILLICIT DRUG ANTI-PROLIFERATION ACT (2003), at [http://www.usdoj.gov/dea/ongoing/anti-proliferation\\_act.html](http://www.usdoj.gov/dea/ongoing/anti-proliferation_act.html) (last visited Feb. 25, 2005). The guidelines require agents to contact headquarters before seeking enforcement of the crack house law, and reaffirm the necessity of the "knowledge" and "purpose" requirements of the statute. See *id.* These guidelines were prompted in part by Senator Biden, who was reportedly troubled by this action of the DEA. See Drug Policy Alliance, *Author of RAVE Act Pushes DEA to Create Guidelines*, July 16, 2003, at [http://www.drugpolicy.org/news/07\\_16\\_03raveact.cfm](http://www.drugpolicy.org/news/07_16_03raveact.cfm) (last visited Feb. 25, 2005). But it is also interesting to note that Senator Biden was *not* troubled by the prosecutions in the State Palace Theater or Club La Vela cases, and in fact used the failures of the prosecutors in those cases as an argument in support of the IDAPA. See 149 CONG. REC. S1678 (daily ed. Jan. 28, 2003) (statement of Sen. Biden).

<sup>293</sup> See Wishnia, *supra* note 288.

<sup>294</sup> See *supra* notes 180–84 and accompanying text.

<sup>295</sup> See *supra* notes 180–84 and accompanying text.

validity.<sup>296</sup> However, these arguments also represent the attitudes of many of the businesspersons who must make costly decisions based on these laws—costly in terms of both the money and rights at stake. As a consequence of these decisions, performers and attendees could lose an integral venue for expressing their music and speech. As such, revisions addressing the vagueness of the law, while perhaps not constitutionally necessary, could alleviate these concerns on a public policy level and help find a middle ground between critics and proponents.

### 3. *Free Speech*

An additional concern is that these bills may infringe upon the right to free speech of promoters, owners, and attendees. As a matter of public policy, this concern is essentially the same as the previous one—expansive promoter and owner liability may lead to a chilling effect on speech or may be enforced in a discriminatory manner against certain kinds of speech.<sup>297</sup> But from a legal standpoint, the content or enforcement of these laws may raise concerns apart from vagueness that, in turn, may suggest additional solutions or grounds for compromise.

The First Amendment to the United States Constitution states that “Congress shall make no law . . . abridging the freedom of speech.”<sup>298</sup> The Supreme Court has laid out a three-step inquiry to review laws such as the ones at issue in this Note.<sup>299</sup> The first step asks whether the law completely bans a form of speech or whether it merely regulates the time, place, or manner of that speech.<sup>300</sup> If the law

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<sup>296</sup> The original crack house law has withstood several constitutional challenges on vagueness grounds. See *United States v. Milani*, 739 F. Supp. 216 (S.D.N.Y. 1990); *United States v. Clavis*, 956 F.2d 1079 (11th Cir. 1992); *United States v. Lancaster*, 968 F.2d 1250 (D.C. Cir. 1992); *United States v. Rosa*, 50 Fed. Appx. 226 (6th Cir. 2002). However, in each of these cases, the defendants were directly involved in the manufacture or distribution of drugs. These challenges have not been ruled upon where the law was applied to owners or promoters of raves and other entertainment events, and all of those challenges occurred before the 2003 IDAPA amendments.

<sup>297</sup> *Hearings: RAVE Act*, *supra* note 19, at 23–24 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU) (discussing these concerns in terms of free speech and vagueness).

<sup>298</sup> U.S. CONST. amend. I.

<sup>299</sup> See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–55 (1986); see also *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 433–434 (2002) (plurality opinion) (describing the analytic framework used in *Renton*). But see *id.* at 448 (Kennedy, J., concurring) (interpreting *Renton*'s framework differently than the plurality, but agreeing with *Renton*'s “central holding”).

<sup>300</sup> See *Renton*, 475 U.S. at 46; *Alameda Books*, 535 U.S. at 434 (plurality opinion).



completely bans the speech, then it receives strict scrutiny review.<sup>301</sup> If the law is a time, place, or manner restriction, the second step asks if the law is content-neutral or content-based.<sup>302</sup> Content-based laws are "considered presumptively invalid and subject to strict scrutiny."<sup>303</sup> But if the law is content-neutral, the third step will uphold the law if it is "designed to serve a substantial governmental interest and do[es] not unreasonably limit alternative avenues of communication."<sup>304</sup> Therefore, in order to avoid the presumptive unconstitutionality of strict scrutiny, a law must be a content-neutral time, place, or manner restriction.

Because none of the laws being considered in this Note completely ban any form of speech, they are properly analyzed as time, place, or manner restrictions.<sup>305</sup> The critical inquiry, therefore, is whether these laws are content-neutral. An exhaustive analysis of this complex issue is outside the scope of this Note, but even a brief consideration shows that opponents of owner and promoter-liability laws have grounds for arguing that they are content-based and therefore presumptively invalid.

The "fundamental principal" of content-neutrality is that the government can not regulate speech because it disagrees with its content.<sup>306</sup> Thus, a law is considered content-neutral if it is "*justified* without reference to the content of the regulated speech."<sup>307</sup> But a law merely regulating the "secondary effects" of a particular form of speech is not considered content-based, even if the text of the law refers to the content of the speech.<sup>308</sup> For such a law, the government's non-

<sup>301</sup> See *Renton*, 475 U.S. at 46; *Alameda Books*, 535 U.S. at 434 (plurality opinion); EUGENE VOLOKH, *THE FIRST AMENDMENT* 273-74 (2001).

<sup>302</sup> See *Renton*, 475 U.S. at 46-47; *Alameda Books*, 535 U.S. at 434 (plurality opinion).

<sup>303</sup> *Alameda Books*, 535 U.S. at 434 (plurality opinion); see *Renton*, 475 U.S. at 46-47.

<sup>304</sup> *Renton*, 475 U.S. at 47; see *Alameda Books*, 535 U.S. at 434 (plurality opinion).

<sup>305</sup> The laws at issue in *Renton* prohibited adult theaters from being "located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school." *Renton*, 475 U.S. at 46. Since this did not qualify as a complete ban on adult theaters, it would be difficult to argue that holding owners of entertainment venues liable for drug activity in their venues is a complete ban on the speech occurring within those venues. *But see* Brunet Motion to Dismiss, *supra* note 128, at 13-16 (arguing that the DEA's goal in enforcing the crack house law against raves is actually to silence the underlying speech).

<sup>306</sup> *Renton*, 475 U.S. at 48-49.

<sup>307</sup> *Id.* at 48 (citations omitted).

<sup>308</sup> *Id.* at 47-49. *But see Alameda Books*, 535 U.S. at 448-49 (Kennedy, J., concurring). Although four Justices in *Alameda Books* agreed with this reading of *Renton*, Justice Kennedy believed that laws referring on their faces to the content of regulated speech should still be deemed content-based. *Id.* However, he agreed with the plurality that laws justified by reference to their "secondary effects," should be subject to the intermediate scrutiny described in *Renton*. *Id.*

discriminatory interest in regulating the secondary effects of the speech is thought to negate the inference that the government is impermissibly regulating the speech because it disapproves of its content.<sup>309</sup>

Each of the owner and promoter liability laws at issue here is presumably justified as regulating drug activity as a secondary effect of musical speech. They would therefore appear to be content-neutral, and only subject to intermediate scrutiny. However, they differ in an important respect from laws previously considered under the secondary effects doctrine, in that they are significantly underinclusive with respect to the kinds of speech responsible for the secondary effect. They thus raise the concern that the government is actually regulating because it disapproves of the content of the speech, and therefore conflict with the "fundamental principal" of content-neutrality.

*Renton* provides an appropriate illustration of this argument. The Court in that case upheld an ordinance restricting the location of adult movie theaters in order to "prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life."<sup>310</sup> Adult movie theaters are arguably the only kind of theaters that contribute negatively to these secondary effects, and the law accordingly covered *all* adult theaters.

But suppose the ordinance had only restricted the location of adult theaters showing *homosexual* adult films or *interracial* adult films; in that case it would have been significantly underinclusive with respect to the kinds of theaters responsible for the secondary effects supposedly being regulated.<sup>311</sup> Such underinclusiveness would raise the concern that the city was not actually interested in regulating the secondary effects of adult theaters, but simply wanted to ban homosexual or interracial adult films because it disapproved of them. This would violate the "fundamental principal" of content-neutrality, and thus it seems doubtful that the Court would subject such a law to intermediate scrutiny. To overcome the discriminatory implications of such a narrow ordinance, the city would undoubtedly have to present extremely convincing proof that homosexual or interracial adult films contribute to the secondary effects in a unique manner or degree.

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<sup>309</sup> *Renton*, 475 U.S. at 48–49; see also *Alameda Books*, 535 U.S. at 448–49 (Kennedy, J., concurring). This "secondary effects" doctrine has received substantial criticism by justices and scholars alike. See, e.g., *Boos v. Berry*, 485 U.S. 312, 334–35 (1988) (Brennan, J., concurring in part and concurring in the judgment); Marcy Strauss, *From Witness to Riches: The Constitutionality of Restricting Witness Speech*, 38 ARIZ. L. REV. 291 (1996) (summarizing criticisms); Kimberly K. Smith, Comment, *Zoning Adult Entertainment: A Reassessment of Renton*, 79 CAL. L. REV. 119 (1991).

<sup>310</sup> *Id.* at 48 (internal punctuation omitted).

<sup>311</sup> Another example might be a law that only held promoters of *Republican* political events liable if they have reason to know of drug activity during their events.

The same form of underinclusiveness is found in the owner and promoter liability laws. The Ecstasy Prevention Act only applies to raves, and the Ecstasy Awareness Act applies only to "a rave or similar electronic dance event."<sup>312</sup> They single out a forum for one particular kind of music, despite evidence of ecstasy use at other kinds of concerts, nightclubs, and private parties, and the common association of drugs with other forms of music including reggae, acid rock, hip-hop, and jazz.<sup>313</sup> What reason could the government have for *excluding* these other locations of drug activity, unless it were actually more concerned with suppressing electronic music than with controlling drugs?

In comparison, the CLEAN-UP of Methamphetamines Act applies to a "rave, dance, music, or other entertainment event"<sup>314</sup> and therefore does not explicitly single out a particular form of music or entertainment for regulation. Despite mentioning raves and dances, this Act appears to include any form of "entertainment event." However, the section heading, "Promoters of Commercial Drug-Oriented Entertainment," seems to undercut this conclusion.<sup>315</sup> That heading implies that the government is really only regulating forms of speech that it deems to be "drug-oriented." The question then becomes whether the government can present sufficient evidence to justify singling out certain forms of entertainment as "drug-oriented," in order to dispel the inference that it is simply regulating forms of entertainment of which it disapproves.

Furthermore, this Act singles out forums for "entertainment," but does not include forums for other kinds of speech. Evidence shows that drug activity at raves and concerts is equal to or less than that at college campuses, schools, or private parties.<sup>316</sup> But what is the government's interest in excluding those other locations from the scope of this law? Why does it feel is it justified in regulating forums for entertainment or musical speech but not other locations with equal or greater drug activity? The government's goal of reducing drug activity may dispel the inference of content-based discrimination, but its decision to regulate only

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<sup>312</sup> Ecstasy Prevention Act of 2001, H.R. 2582, 107th Cong. § 3 (2001); Ecstasy Awareness Act of 2003, H.R. 2962, 108th Cong. § 2 (2003).

<sup>313</sup> See Brunet Motion to Dismiss, *supra* note 128, at 6 (noting that jazz, reggae, and rock music also share a reputation for high incidents of drug activity); PULSE CHECK, *supra* note 68, at 81 (showing that ecstasy use at raves is similar to its use at nightclubs, college campuses, private residences, and private parties).

<sup>314</sup> CLEAN-UP of Methamphetamines Act, H.R. 834, 108th Cong. § 305(a) (2003).

<sup>315</sup> *Id.*

<sup>316</sup> See PULSE CHECK, *supra* note 68, at 15, 35, 48, 81. In relevant part, this report surveyed twenty-one cities with respect to sales of heroin, crack-cocaine, powder-cocaine, and ecstasy, asking where each drug was sold among a number of locations, including raves and concerts, schools, college campuses, and private parties. The responses to these surveys show that there were a total of forty-nine reports of sales at raves and concerts, forty-eight at schools, sixty at college campuses, and sixty-one at private parties. *Id.* (author's summary of statistics).

some forums for speech associated with drug activity reinstates that fundamentally impermissible inference.

By comparison, the federal crack house law is a content-neutral statute that applies to "any place,"<sup>317</sup> and therefore does not raise the same kind of concerns as the other two Acts. The Supreme Court held in *Arcara v. Cloud Books, Inc.*<sup>318</sup> that applying a state's content-neutral statute to a situation where free speech conduct occurs is not automatically unconstitutional, even if it does incidentally burden the speech activities.<sup>319</sup> However, some critics have still argued that the application of the crack house law to promoters and owners who are not directly involved in drug trafficking does violate the First Amendment.<sup>320</sup> This is because the behavior covered by the statute—knowingly opening any place—is the very same behavior that implicates free speech.<sup>321</sup> By comparison to *Arcara*, opening a bookstore and permitting prostitution are completely distinct acts,<sup>322</sup> but under the crack house law, promoting or hosting a rave and knowingly opening a place for the sale of drugs are the *same* act.<sup>323</sup> The chilling effect and burden placed on protected conduct are therefore greater when the crack house law is applied in the context of raves and musical events.

Finally, to the extent that the crack house law is justified by the secondary effects doctrine, it *application* raises the same concerns as the two Acts discussed above.<sup>324</sup> Enforcement strategies like the Department of Justice bulletin<sup>325</sup> and

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<sup>317</sup> 21 U.S.C. § 856(a)(1) (2000).

<sup>318</sup> *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986).

<sup>319</sup> *Id.* at 704–07 (upholding application of an anti-prostitution statute to a bookstore, despite burdening the defendant's First Amendment right to operate a business involving speech).

<sup>320</sup> See, e.g., Christina L. Sein, Note, *The Agony and the Ecstasy: Preserving First Amendment Freedoms in the Government's War on Raves*, 12 S. CAL. INTERDISC. L.J. 139 (2002) (arguing for overbreadth of the crack house law as applied to promoters and owners not directly involved with drug trafficking).

<sup>321</sup> *Id.* at 158.

<sup>322</sup> See *Arcara*, 478 U.S. at 704–07.

<sup>323</sup> Sein, *supra* note 320, at 158. In other words, the protected conduct and the unlawful conduct in *Arcara* were distinct and severable, meaning the chilling effect on one does not affect the other. But under the crack house law, both the protected and prohibited conduct are the same act—meaning the chilling effect on one inherently transfers to the other. See *id.* And to the extent that acts prior to an event may be used to show someone's knowledge or purpose under the crack house law, the actual *act* being prohibited is still the hosting of the event. See *infra* note 334 and accompanying text.

<sup>324</sup> The question of whether a facially neutral law may be considered content-based because of its impact has yet to be directly addressed by the Supreme Court, and its decisions do not point to a clear outcome. For a brief discussion of this issue, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 908–09 (2d ed. 2002).

statements from the DEA that specifically target raves for enforcement but ignore other venues of drug trafficking appear to be underinclusive and may even raise concerns of selective prosecution.<sup>325</sup>

As shown above, the debate over expanding liability for owners and promoters as a means of addressing club drugs involves many important and related issues of law and policy. But when considered within the framework provided in this Note, the issues may be somewhat more manageable and the debate more productive. On the one side, the major motivations for expanding liability are concerns about drug abuse and frustration over the ineffectiveness of current procedures. On the other side, the major motivations for opposing this expansion are that it may be ineffective, that the vagueness inherent in the Acts may prevent a genre of music and a form of speech from being expressed, and that the drafting and enforcement of the Acts may discriminate against particular forms of speech.

## VI. PROPOSALS FOR ADVANCING THE DEBATE ON OWNER AND PROMOTER LIABILITY

While the goal of the preceding discussion is to provide a neutral framework for continued discussion on the extent to which promoters and owners of entertainment should be liable for drug activity occurring on their premises, this section seeks to advance this discussion. Other commentators have suggested that rather than expanding liability for owners and promoters, law enforcement should use asset forfeiture laws,<sup>327</sup> public nuisance actions,<sup>328</sup> or simply prosecute drug dealers directly under existing laws.<sup>329</sup> These are all important alternatives to consider, but there may also be ways to construct liability for owners and

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<sup>325</sup> See INFORMATION BULLETIN: RAVES, *supra* note 50, at 5–6.

<sup>326</sup> See, e.g., *Hearings: America at Risk*, *supra* note 59 (statement of Donnie Marshall, Adm'r, Drug Enforcement Admin.). The DEA Administrator's statements seem to suggest that raves as a whole would be targeted, not simply those raves which were being used as a cover for drug activity. See *id.*; Sein, *supra* note 320, at 148. If this were true, the DEA might be selectively prosecuting owners and promoters of electronic music precisely *because* of the specific content of their speech, which may amount to selective prosecution. See *Arcara*, 478 U.S. at 707 n.4 (noting that if the defendant had claimed that the anti-prostitution statute were being enforced against him *because* of his particular speech, this could amount to unconstitutional selective prosecution) (emphasis added); see generally *Wayte v. United States*, 470 U.S. 598, 605 (1985) (explaining a *prima facie* case of selective prosecution as (1) others in a similar position were not prosecuted for similar conduct and (2) prosecution was pursued on "impermissible grounds, such as race, religion, or exercise of First Amendment rights").

<sup>327</sup> See Michael H. Dore, Note, *Targeting Ecstasy Use at Raves*, 88 VA. L. REV. 1583, 1612 (2002).

<sup>328</sup> See Kopel & Reynolds, *supra* note 238.

<sup>329</sup> See *Hearings: RAVE Act*, *supra* note 19, at 21 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU).

promoters that directly address the contentious issues discussed above. Two possible solutions are adding a safe-harbor provision and content-neutral drafting.

As simple as it may appear, a safe harbor provision may do much for both sides in this debate. Such a provision need not undermine the effect of any law or temper the operative language, but would simply state conditions where liability would *not* be imposed.<sup>330</sup> As a source for a safe harbor provision, laws creating liability for permitting prostitution on one's property may serve as a useful guide. These laws have been enacted by several states, and generally impose liability when a person having possession of a building has knowledge or reasonable cause to know that the building is being used for prostitution.<sup>331</sup> What is particularly interesting is that every one of these statutes contains a safe harbor provision, so that persons are liable only if they "fail to make reasonable effort to halt or abate such use."<sup>332</sup>

In the context of liability for owners and promoters of entertainment events, this same safe harbor provision would give guidance to persons seeking to host such events as well as to law enforcement seeking to apply any such statute. Owners and promoters could still host large-scale events where drug use is inherently very likely to occur, but could rest assured that if they took reasonable precautions to prevent drug use or sales at their event, they would not face prosecution, jail, fines, or forfeiture.<sup>333</sup> Likewise, law enforcement would have a relatively clear standard for determining whether a given event warrants investigation or arrests. Rather than having to use tangential and often inconclusive evidence to try to infer whether owners and promoters have

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<sup>330</sup> See, e.g., *id.* at 24 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU).

<sup>331</sup> See, e.g., CONN. GEN. STAT. § 53a-89 (2003); 11 DEL. CODE ANN. tit. 11, § 1355 (2003); KY. REV. STAT. ANN. § 529.070 (2003); N.Y. PENAL LAW § 230.40 (2003); WASH. REV. CODE ANN. § 9A.88.090 (2004); 9 GUAM CODE ANN. § 28.25(4) (2003).

<sup>332</sup> See CONN. GEN. STAT. § 53a-89 (2003); 11 DEL. CODE ANN. tit. 11, § 1355 (2003); KY. REV. STAT. ANN. § 529.070 (2003); N.Y. PENAL LAW § 230.40 (2003); WASH. REV. CODE ANN. § 9A.88.090 (2004); 9 GUAM CODE ANN. § 28.25(4) (2003). It is interesting to note that there are a number of state public nuisance statutes and laws creating liability for operating a house of prostitution that allow permissive liability. But most of these statutes also require that the premises be used "for the purpose" of prostitution, and do not impose liability unless the person has actual knowledge of prostitution. See, e.g., COLO. REV. STAT. § 18-7-204 (2003); GA. CODE ANN. § 16-6-10 (2002); FLA. STAT. ANN. § 796.07(2)(c) (2003); HAW. REV. STAT. §§ 712-1201, 712-1204 (2003); 720 ILL. COMP. STAT. 5/11-17 (2004); IOWA CODE § 99.1A (2003); MISS. CODE ANN. § 95-3-1 (2004); NEB. REV. STAT. § 28-804 (2003); N.C. GEN. STAT. § 14-204(3) (2004); OHIO REV. CODE ANN. § 3767.01(c)(2) (2003); OKLA. STAT. tit. 21, § 1028(d) (2003); R.I. GEN. LAWS § 11-30-1(1) (2003); UTAH CODE ANN. § 47-1-1 (2003); W. VA. CODE § 61-8-5 (2003); WIS. STAT. § 823.09 (2003).

<sup>333</sup> See *Hearings: RAVE Act, supra* note 19, at 23, 24 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU).

“knowledge” of drug use (either actual or constructive) or are holding an event “for the purpose” of such use,<sup>334</sup> they can look for more objective and readily identifiable measures that the owner or promoter has taken to prevent drug use. If these measures are unreasonable, there are firm grounds for proceeding with further investigation; if not, law enforcement can move on without feeling that they have walked away from a potential danger.

Of course, what exactly constitutes “reasonable” measures to prevent drug activity is still open to some interpretation, but it would have to be defined by reference to the common practices of the live entertainment industry. Doing so would help give owners, promoters, and law enforcement a shared and more objective guide as to what kinds of precautions are appropriate and expected. Also, measuring compliance with respect to industry practice provides a more solid justification for imposing liability on owners and promoters. Rather than being liable for their mere knowledge of drug activity (a trait shared by all of the industry), owners and promoters would be liable for failing to take the reasonable precautions that the rest of the industry has adopted. As a result, a safe harbor provision would alleviate most of the vagueness concerns discussed above by providing clear guidance to business owners and law enforcement as to how a law should be interpreted and enforced.

Including a safe harbor provision would also allow laws expanding liability for owners and promoters to address the concerns and frustrations discussed above, because a safe harbor provision would not undermine the operative portions of any such statute. It would simply focus the statute’s operation on only those situations where persons were criminally irresponsible. If owners or promoters are participating in drug sales—either directly or through their staff—they are certainly not taking reasonable precautions.<sup>335</sup> Likewise, if promoters tell security guards to ignore drug use or sales, they are certainly not taking reasonable precautions and would be liable. And even if owners or promoters are simply derelict in their duty to host a safe and lawful event, for example, by failing to employ a security staff in a situation where they know drug use is going to occur, they would not be protected by a safe harbor provision.

But in those situations where an owner or promoter chooses to host an event where drug use is likely—even virtually certain—to occur, and they take reasonable precautions to prevent and abate that use, a safe harbor offers reasonable and desirable protection from criminal prosecution and liability.

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<sup>334</sup> Much of the evidence in the State Palace Theater and Club La Vela cases was based on factors such as selling bottled water, blow pops, having air conditioned rooms, and having medical personnel on call. See Brunet Motion to Dismiss, *supra* note 128, at 8–9; Pfeiffer Motion to Dismiss, *supra* note 139, at 8–9.

<sup>335</sup> Of course, they would also be directly liable for drug trafficking under 21 U.S.C. § 841 (2000).

Again, in such situations, opinions would certainly differ about what “reasonable precautions” would mean. But without a safe harbor, criminal liability in these situations would have staggering implications. It would mean that owners and promoters would be liable regardless of whatever precautions they take. This in turn would mean that such events—forums for speech protected by the Constitution—are required by law to be shut down so that drug statutes do not have the opportunity to be violated.<sup>336</sup> Such a position seems to reverse our hierarchy of values.<sup>337</sup> As such, a safe harbor provision would allow liability for owners and promoters in appropriate situations, but would help make laws more responsive to the concerns of businesses, performing artists, and attendees.

Finally, a second proposal is that any laws expanding liability should be strictly content-neutral, like the crack house law. To the extent that this debate is about whether it is acceptable to impose liability on a person for maintaining premises that they know are being used for drug activity (without encouraging or otherwise contributing to that activity), it is important to establish that this is, in fact, an acceptable basis for criminal culpability. But a law criminalizing permissive conduct only at particular venues or concerning certain kinds of speech undermines any such basis. Such a law inherently implies that the underlying acts are *not* a sufficient basis for liability—that there is something *additionally* wrongful about those kinds of events or speech that is necessary to justify imposing criminal liability.

A law like the Ecstasy Awareness Act or CLEAN-UP of Methamphetamines Act would declare that if a person runs a school where they know drug use is occurring, they have not committed a wrong, but if they run a music event where they know drug use is occurring, they have. This means that the mere knowledge

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<sup>336</sup> In other words, the only way not to violate the law would be to not host the event. By implication, the event would therefore be illegal.

<sup>337</sup> While simply using drugs in conjunction with free speech does not make the user immune from liability, a law that makes a blanket conclusion to ban events where an owner knows drug use will occur goes far beyond this. A Louisiana district court has noted that the Constitution does place limits on measures that may be taken in the name of preventing drug use. *See McClure v. Ashcroft*, No. 01-CV-2573-T, 2002 U.S. Dist. LEXIS 2532, at \*18 (E.D. La. Feb 1, 2002), *vacated on other grounds*, *McClure v. Ashcroft*, 335 F.3d 404 (5th Cir. 2003) (ruling that third parties do not have standing to challenge a criminal plea agreement). As that court stated:

Although this Court recognizes the perils of drug use, especially by young people, and this Court recognizes that the intentions of the agents and prosecutors involved were pure, when the First Amendment right of Free Speech is violated by the government in the name of the War on Drugs and when that First Amendment violation is arguably not even helping in the War on Drugs, it is the duty of the Courts to enjoin the government from violating the rights of innocent people.

*Id.* at \*17–18.



of drug use (or even the failure to take measures to prevent drug use) is not a sufficient basis for liability.

Alternatively, such a law may admit that knowledge of drug use is an acceptable basis for liability in any circumstance, but that it is justifiable to apply it only to music or entertainment events because they are somehow less valuable to society than schools. Obviously, this involves a sensitive exercise in weighing the subjective values of personal activities. Were the law to hinge on such subjective weighing, it would undermine the notion that knowledge of drug use, standing alone, is actually an acceptable basis for criminal culpability.

In this respect, an additional benefit of adding a safe harbor provision is that laws creating liability for owners and promoters may be written more broadly. Content-neutral drafting would avoid concerns of discrimination against music in general or against specific kinds of music, and a safe-harbor provision would keep the law from unfairly intruding into areas like public schools, private parties, and college campuses. To the extent that the owners of these other premises take reasonable precautions to prevent drug use, they will not be liable. And to the extent that they do not take reasonable precautions, what is the justification for *not* imposing liability on them, while *imposing* it on owners of entertainment events? At its core, this question simply restates the underlying issues in the larger debate: should we impose liability on owners and promoters of entertainment events, and if so, why?

## VII. CONCLUSION

Although the idea of holding landowners responsible for the actions of persons on their property is not without precedent, its application in the context of music, speech, or other entertainment events raises serious concerns. Because of the tendency to link particular forms of music to drug use—as happened with jazz and marijuana in the 1920s, psychedelic rock and LSD in the 1970s, and punk and speed in the 1980s<sup>338</sup>—there is a dangerous likelihood that certain forms of speech will be discriminated against in the enforcement of owner and promoter liability laws. Events may often be targeted because of the kind of music being played, rather than for deviating from societal or industry norms, which is the most fundamental requirement for imposing criminal liability. However pressing the problem of club drugs may be, the right to engage in protected speech, music, and dance cannot be sacrificed in the name of attempting to reduce drug activity.

But there may be ways of implementing an expansion of liability for owners and promoters without making this sacrifice. The benefits of this Note's proposed framework are that it helps to give structure to the issues in this debate, and in doing so offers opportunities for compromise. A safe harbor provision and neutral

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<sup>338</sup> See Brunet Motion to Dismiss, *supra* note 128, at 23.

drafting would help address some of the concerns of those who are wary of expanding liability, without undermining the effectiveness of any such expansion. To the extent that people oppose these suggestions, their position implies that they would rather squelch innocent and protected conduct than accept an eminently reasonable compromise.

Finally, even if knowledge of drug use is accepted as a viable basis for liability, and even if laws use a safe-harbor and content-neutral drafting, there are many remaining issues on the table, such as the appropriate level of criminal punishment, whether civil penalties should be allowed, and guidelines to ensure non-discriminatory enforcement.<sup>339</sup> When considering all of these issues, it is important to always keep in mind that—just as they are really only sub-issues in the debate over liability for owners and promoters—this entire debate is really only one issue in a broader discussion of how our nation's drug policy should function as a whole, where that policy stands with respect to the rest of the world, and what policy will best promote the safety, health, and happiness of society.

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<sup>339</sup> See *Hearings: RAVE Act*, *supra* note 19, at 24 (prepared statement of Graham Boyd, Dir., Drug Policy Litig. Project, ACLU) (discussing recommendations for amendments to the RAVE Act).